Supreme Court, U.S.
FILED
SEP 18 1992
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92-508

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MISSOURI,
Petitioner,

vs.

RONALD HANKINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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84 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the state waive its Eleventh Amendment immunity by paying a civil rights judgment entered against a former state employee or by attaching the judgment proceeds in a separate state court proceeding?

2. Can a state's Eleventh Amendment immunity be waived by actions or conduct of state officials taken pursuant to state statutes which disclaim any intent to waive such immunity?

3. After a federal court judgment has been paid, does Rule 69 of the Federal Rules of Civil Procedure authorize a federal court to grant declaratory and injunctive relief, immunizing the proceeds of the judgment from a claim under state law, which the court would not have had jurisdiction to enter had such relief been sought in either an independent action or removal of a pending action in state court?

4. In the absence of any factual record, is a state statute creating a cause of action for reimbursement of costs of incarcerating an inmate preempted by 42 U.S.C. § 1983, such that the state may not pursue its cause of action against the assets of an inmate which are derived from a monetary judgment in his favor under the Civil Rights Act?

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RONALD HANKINS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, State of Missouri, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 964 F.2d 853 and is reprinted as Appendix A in the Appendix to this petition. The opinion of the District Court is reported at 759 F.Supp. 569 and is reprinted as Appendix B in the Appendix.

JURISDICTION

The state of Missouri petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth

Circuit in this case. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1343(3) and (4).

The opinion of the Court of Appeals was entered on May 22, 1992. Rehearing and rehearing en banc was denied on June 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant constitutional provision involved in this case is the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

§ 105.711, *et seq.*, RSMo 1991 Supp.

§ 217.825, *et seq.*, RSMo 1991 Supp.

The pertinent text of each statute is set forth in Appendix D pursuant to Rule 14.1(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

This case arises in the context of a civil rights action commenced by the respondent, an inmate confined by the Missouri Department of Corrections, against a former employee of the Department. The issues raised in this petition have nothing to do with the merits of that claim. This case involves an order declaring a statute of the state of Missouri preempted by 42 U.S.C. § 1983 and enjoining the state from attaching the proceeds of the federal judgment while pursuing a cause of action which the statute had created in its favor. Since the state of

Missouri was not a party to the underlying civil rights action, the issues to be resolved here involve the extent of federal court jurisdiction over the state of Missouri and the parameters of the Eleventh Amendment to the United States Constitution. The issues concern (1) whether a state can waive its Eleventh Amendment immunity by virtue of conduct outside the context of federal litigation, (2) whether, after a federal court judgment has been paid, a district court possesses any authority under Rule 69 of the Federal Rules of Civil Procedure to issue a declaration that a state statute is federally preempted, and enjoin the state of Missouri from acting pursuant to that statute, and (3) whether a state statute creating a cause of action on behalf of a state is preempted by 42 U.S.C. § 1983, thereby prohibiting the state from attempting to recover on its cause of action from the proceeds of a civil rights judgment.

On August 8, 1989, a jury verdict was entered against a former employee[1] of the Missouri Department of Corrections in the United States District Court for the Western District of Missouri, Central Division. The plaintiff in that action (respondent herein) was awarded One Dollar ($1.00) in nominal damages and Three Thousand Dollars ($3,000.00) in punitive damages. The United States Court of Appeals for the Eighth Circuit affirmed the District Court Judgment in a *per curiam* order entered on June 29, 1990. On July 31, 1990, the state of Missouri filed a petition in the Circuit Court of Cole County under the Missouri Incarceration Reimbursement Act, § 217.825, *et seq.*, RSMo Supp. 1991, requesting partial reimbursement for the costs of incarceration of the respondent. On August 17, 1990, the Circuit Court of Cole County, the Honorable James McHenry, Judge, entered an order appointing Jerome Weiler, the Treasurer of the Missouri Department of Corrections, as receiver of funds held on

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[1] Aside from the parties named in the caption, the former employee, William Finnel, is the only other party to the proceedings in the Court of Appeals below.

behalf of the respondent, and directed the receiver to not disburse respondent's assets except upon specific order of the court. On August 20, 1990, the sum of Three Thousand Two Hundred Twenty Four Dollars ($3,224.00), representing the amount of the jury award, plus interest, was deposited in the respondent's inmate account with the Treasurer of the Missouri Department of Corrections. On the same day, Jerome Weiler, pursuant to the Circuit Court order, debited the respondent's inmate account in the same amount and separately held those funds.

On November 6, 1990, the respondent, pursuant to Rule 69 of the Federal Rules of Civil Procedure, filed a motion for proceedings in aid of execution and for writ of mandamus to stay the state court proceedings. The request for stay of the state court proceedings became moot when the Circuit Court of Cole County voluntarily stayed the state court proceedings pending resolution of the motion in federal court. On January 28, 1991, the District Court granted the respondent's motion, concluding that the District Court had jurisdiction under Rule 69 of the Federal Rules of Civil Procedure and that the state had waived its immunity under the Eleventh Amendment to the United States Constitution. The District Court also concluded that the Missouri Incarceration Reimbursement Act was preempted under the Supremacy Clause as being in conflict with 42 U.S.C. § 1983. The state of Missouri was enjoined from attaching, as part of the state court proceedings, the funds received by the respondent as damages in the underlying civil rights action.

A timely appeal was taken to the United States Court of Appeals for the Eighth Circuit and on May 22, 1992, a majority of the panel which heard the appeal affirmed the District Court's order. The majority concluded that the state of Missouri had waived its Eleventh Amendment immunity by payment of the judgment on behalf of its former employee pursuant to the Legal Expense Fund, § 105.711 through 105.726, RSMo 1986, and filing its action under the Reimbursement Act. A majority of the

panel held that, despite the payment of the judgment, the District Court had jurisdiction under Rule 69 of the Federal Rules of Civil Procedure and that the Missouri Incarceration Reimbursement Act was preempted by federal law. A timely motion for rehearing or rehearing en banc was filed and on June 25, 1992, rehearing was denied. Five of the ten judges of the Court of Appeals would have granted rehearing en banc. A copy of the Court's order is attached hereto as Appendix C, p. A-36.

REASONS FOR GRANTING A WRIT

I.

THE COURT OF APPEALS BELOW, CONTRARY TO DECISIONS OF THIS COURT, FOUND THAT THE STATE OF MISSOURI HAD CONSTRUCTIVELY WAIVED ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

The District Court and the Court of Appeals found that the state of Missouri had waived its Eleventh Amendment immunity although it was not a party to the underlying civil rights litigation. The precise rationale for this conclusion is difficult to determine. The Court of Appeals stated it was "based on the combination of factors present here, . . ." Appendix A, p. A-10. Although the Court gave a narrative account of the events in the post-judgment phase, it never precisely identified the "factors" which led it to conclude that the state of Missouri had waived its constitutional immunity. The court discussed waiver by conduct without specifying whether both acts or only one amounted to waiver. Apart from waiver by conduct, the court discussed specific statutory language or the absence of a statutory provision without specifying whether it found a legislative waiver. As a result, analysis of the court's holding is akin to a murder mystery in which the detective confronts the suspects and eliminates them one by one. While that approach works well for fiction, it makes for disjointed legal writing. However, that approach is forced by the nature of the opinion below.

This Court has consistently applied an extremely stringent standard for both abrogation and waiver of a state's immunity under the Eleventh Amendment to the United States Constitution. The rationale for establishing a high standard for the

elimination of a state's constitutional immunity was explained in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990).

> Because "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,'" . . . and because States are unable to remedy a judicial misapprehension of that abrogation, the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity. . . . Similar solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived that immunity.

Id. at 305. Thus, this Court stated in *Edelman v. Jordan*, 415 U.S. 651, 673 (1974):

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

See also Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-240 (1985) and *Port Authority Trans-Hudson Corp. v. Feeney*, supra at 305.

In the instant case, the state of Missouri was not a party to the underlying civil rights action. The underlying action proceeded against a state employee only in his individual capacity. However, in the post-judgment phase, declaratory relief was granted to the effect that a state statute was preempted by 42 U.S.C. § 1983 and injunctive relief was granted against the state of

Missouri which prohibited it from attaching respondent's assets in state court on a state cause of action. The District Court and the Court of Appeals below claim to find a waiver by the state of Missouri "based on the combination of factors present here, . . ." Appendix A, p. A-10. Petitioner submits that neither singly nor in combination do any of the matters discussed by the Court below meet the stringent test formulated by this Court. As Judge Beam stated in his dissent below:

> The second error more directly involves the Eleventh Amendment. In support of some supposed public policy consideration involving section 1983 actions, thedistrict court and the majority seek to blur the line drawn by the Supreme Court which separate the state from its employees in this kind of litigation. The reasoning employed by the district court and the majority runs upstream from the unambiguous holdings of the Supreme Court.

Appendix A, p. A-20.

A. Waiver by Conduct

Despite the Court's brief discussion of abrogation of the Eleventh Amendment, it is clear that the only issue in this case involves an alleged waiver thereof.[2] At the beginning of its discussion of waiver, the court below stated that a state may waive its Eleventh Amendment immunity through conduct. However, the only cases cited by the court below on this point related to conduct by a state as a participant in federal litigation. *See Garrity v. Sununu,* 752 F.2d. 727 (lst Cir. 1984); *Clark v. Barnard,* 108 U.S. 436 (1883); *Sosna v. Iowa* 419 U.S. 393

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[2] Neither the District Court nor the Court of Appeals found a congressional abrogation of the Eleventh Amendment in this instance. The only federal statute relevant to this case, 42 U.S.C. § 1983, has been specifically found not to constitute a congressional abrogation of the Eleventh Amendment. *Quern v Jordan,* 440 U.S. 332 (1979).

(1975); and *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880 (lst Cir. 1984), *cert. denied* 469 U.S. 1191 (1985). Appendix A, p. A-6. Of course, participation in federal litigation, or even removal of litigation to federal court, will not always result in a waiver of the Eleventh Amendment. *See Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986) (removal to federal court did not waive the Eleventh Amendment because the Attorney General and Sheriff were not authorized to waive the state's immunity); *AMISUB (PSL) v. Colorado*, 879 F.2d 789 (l0th Cir. 1989), *cert. denied* 110 S.Ct. 3212; *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 556 n.6 (5th Cir. 1988).

Of course, there was never any doubt that in the instant case, the state of Missouri was never a participant in the underlying litigation. What the court below appears to hold, without citation of any authority, is that a state's conduct outside the context of the federal litigation might amount to a waiver of the Eleventh Amendment.[3] Petitioner believes that to hold the state's conduct outside the context of federal litigation amounts to a waiver of the Eleventh Amendment is a drastic extension of the present case law.

B. Authority to Waive Immunity

The court below also totally neglected to address the question of whether the appropriate authorities had the authority to waive the state's Eleventh Amendment immunity. The two instances of the state's conduct addressed by the court below were the payment of the civil rights judgment and the filing of the claim under the Incarceration Reimbursement Act. The former was

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[3] While some cases indicate that a state may waive its Eleventh Amendment immunity by participation in some federal program, a possible waiver by that sort of conduct has no relevance to the instant case wherein the state of Missouri was not participating in any federal program relevant to the underlying litigation.

approved by the Attorney General's Office but mechanically accomplished by the Missouri Treasurer and Commissioner of Administration. The latter was filed solely by the Attorney General's Office. The question whether these officials had the authority to waive the state's immunity is a question of state law rather than federal law.

In *Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 323 U.S. 459 (1945), this Court held that the Attorney General of Indiana did not have the authority to waive the state's Eleventh Amendment protection because under the Indiana Constitution, there could be no special act authorizing a suit against the state. As a result, the state legislature could waive state immunity only by general law and it could not be presumed that administrative or executive officers had such authority which was denied to the legislature. Similarly, the Missouri Constitution proscribes special legislation "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before courts, . . ." Art. III, § 40(4), Mo.Const. Therefore the Missouri General Assembly could not waive the state's immunity otherwise than by general law. The court below specifically ignored Missouri case law holding that "abrogation of sovereign immunity flows from the consent of the legislature, not the state's agents." *State ex rel. Regional Justice Information Service Comm. v. Saitz*, 798 S.W.2d 705, 708 (Mo. banc 1990). The court below relied upon this Court's opinion in *Sosna v. Iowa*, 419 U.S. 393 (1975), but ignored the fact that Iowa law evidently gave the official in that case the authority to consent. In short, by relying upon the conduct of officials who are not authorized to waive the state's immunity, the court below ignored longstanding principles enunciated by this Court.

C. Intent to Waive Immunity

Finally, the conduct upon which the court below relied is simply insufficient to meet the standard of waiver. The question of waiver by conduct is not so much whether a court believes that

a state should be subject to federal jurisdiction but whether the state's conduct evinces an *intent* to subject itself to federal jurisdiction. Nowhere in its opinion does the court below even address the question of the state's intent. However, having failed to do so, the court's holding can be taken as nothing more than a constructive waiver of the sort disapproved by this Court in *Edelman v. Jordan*. The payment of the judgment entered against one of its former employees and the filing of a separate claim in state court simply do not demonstrate that it was the express and unequivocal intent of the state of Missouri to subject itself to federal jurisdiction, even under limited circumstances. As stated by Judge Beam in his dissent:

> The Supreme Court has repeatedly rejected constructive waiver arguments such as those made here and has established that waiver can be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" . . . Even ignoring the express disavowal of waiver, the holdings of the district court and the majority are wrong given the nearly insurmountable presumption against constructive waivers of Eleventh Amendment immunity.

Appendix A, p. A-21- A-22.

D. Legislative Waiver of Immunity

The "express disavowal" referred to by Judge Beam relates to the other possible "factor" regarding waiver. The court below, in addition to referring to the state's conduct, referred to the two state statutes at issue: the Missouri Legal Expense Fund and the Missouri Incarceration Reimbursement Act. Under the former Act, § 105.711, *et seq.* (Appendix D, p. A-37), the state of Missouri established a monetary fund to pay judgments entered against either the state or its officials and employees for claims arising from performance of official duties and authorized the

Attorney General to provide legal representation to such officials or employees. Section 105.726 provides that nothing in the Act "shall be construed to broaden the liability of the state of Missouri beyond the provisions of §§ 537.600 to 537.610, RSMo, nor to abolish or waive any defenses at law which might otherwise be available to any agency, officer or employee of the state of Missouri." Sections 537.600 and 537.610 relate to state waiver of sovereign immunity in cases involving state automobiles and dangerous conditions of state property. This limited waiver of Missouri's sovereign immunity applies only to state courts and is not a waiver of the Eleventh Amendment immunity. *Complaint of Valley Towing Service,* 581 F.Supp. 1287 (E.D. Mo. 1984). Courts which have considered the effect of similar statutes have concluded that such statutory indemnification of state employes does not amount to a waiver of a state's Eleventh Amendment immunity. *Williams v. Bennett,* 689 F.2d 1370 (llth Cir. 1982); *Elliot v. Hinds,* 573 F.Supp. 571 (N.D. Ind. 1983); *U.S. v. DCS Development Corp.,* 590 F.Supp. 1117 (W.D. N.Y. 1984); *Duckworth v. Franzen,* 780 F.2d 645 (7th Cir. 1985), *cert. denied* 479 U.S. 816 (1986). *See also Westinghouse Electric Corp. v. West Virginia Dept. of Highways,* 845 F.2d 468 (4th Cir. 1988) (neither existence of liability insurance nor past voluntary payment of tort claims can be construed as a waiver of the Eleventh Amendment).

The court below recognized that the Missouri legislature expressed its intent not to waive sovereign immunity by virtue of the enactment of the Legal Expense Fund. However, the court went on to state:

> That section disavows waiver, however, only with regard to the statutes that pertain to the State Legal Expense Fund, it says nothing about the Missouri Incarceration Reimbursement Act.

Appendix A, p. A-8. The court later noted that

> [t]he State cites no case that addresses whether a statute similar to Missouri's Incarceration Reimbursement Act waives sovereign immunity when state officials rely on that statute to recoup the judgment of an inmate who has successfully sued a state employee in federal court on a federal claim.

Appendix A, p. A-9. The first statement of the court below appears to place on the state the burden of expressly disclaiming a waiver of sovereign immunity. The second appears to more generally place on a state the burden of proving absence of a waiver. Petitioner submits that either approach would clearly be contrary to the decisions of this Court placing upon a proponent of waiver the stringent burden of establishing the existence thereof in accordance with the above standards. *See Atascadero State Hospital v. Scanlon, supra* at 238. Even in the absence of any express disclaimer of waiver, it would be incumbent upon a plaintiff to demonstrate that a state has expressly and unequivocally waived its immunity.

The meaning of the court's holding is all the more puzzling because the majority cited no case addressing possible waiver by virtue of a statute similar to Missouri's Incarceration Reimbursement Act. The only language of the Incarceration Reimbursement Act referred to by the court was the definition of assets which includes money judgments received by the offender as a result of civil actions against the state, its agencies or employees. While this is certainly broad enough to include judgments rendered in federal court, there is no particular reference to federal courts nor is there any express and unequivocal language which would demonstrate the General Assembly's intent to subject the state to federal jurisdiction. In fact, the court below did not even find such an intent from any language contained in the statute. Petitioner submits that because § 217.835.1, RSMo, provides that state circuit courts "shall have exclusive jurisdiction," there is a clear indication that no waiver was intended.

The court below, however, stated that by virtue of the state's Reimbursement Act claim, it sought to take advantage of the underlying civil rights suit. The court below appears to hold that this constitutes a waiver although the only case cited for a waiver by virtue of taking "advantage" of a federal suit is *United States v. DCS Development Corp., supra,* in which the court did not actually find a waiver. The court in that case simply noted in passing that the state Attorney General had not filed any counterclaim. Neither did the state of Missouri in the instant case file any counterclaim. It filed a separate action in state court. As Judge Beam explained in his dissent, the state did not seek to take advantage of the federal suit in the same sense referred to in the above case. "Missouri's position is comparable to that of a tort victim who decides to sue a previously insolvent tortfeasor in another case upon learning that the tortfeasor has received a judgment from a third party." Appendix A, p. A-23. This is simply not the sort of conduct sufficient to constitute an express and unequivocal waiver of something as significant as the Eleventh Amendment.

Finally, the court below likened the state's filing of the reimbursement claim as reneging on its promise to pay under the Legal Expense Fund Act. Appendix A, p. A-10. While the state strongly disagrees with that characterization of the events below, the simple fact is that even if a state does not indemnify its employees, there is still no claim against the state. Missouri's waiver of sovereign immunity is limited to two instances which are not relevant to any claim by an employee for indemnification. Even assuming that an employee had such a cause of action, it could not be pursued in federal court absent a waiver of the Eleventh Amendment. *See Blaylock v. Schwinden,* 862 F.2d 1352, 1354 n. 1 (9th Cir. 1988) (an employee claim for indemnification must be brought in state court because of the Eleventh Amendment).

In short, the opinion below finds a constructive waiver of the Eleventh Amendment by the state of Missouri on a basis which ignores virtually every principle established by this Court regarding waivers of a state's immunity. This Court established an extremely stringent test since "States are unable directly to remedy a judicial misapprehension" of either abrogation or waiver of its immunity. Given the failure of the court below to follow the standards established by this Court, the state's only remedy from this judicial misapprehension of a waiver is to seek review by this Court.

E. Applicability of the Eleventh Amendment

After having concluded that the state of Missouri waived its Eleventh Amendment immunity, the court below stated, as an apparent after thought, that it was unnecessary to even reach the Eleventh Amendment issue. The court stated that this was because, even though the state itself could not be enjoined, state officials could under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Of course, the respondent had not requested relief against any named official, nor had the District Court phrased its order in those terms. Petitioner does not believe that the court's quasi-harmless error holding has any place in Eleventh Amendment jurisprudence. Even in a case in which individual state officials were parties, this Court has indicated that a state retains its immunity and interest in being dismissed from a suit. *Alabama v. Pugh*, 438 U.S. 782 (1978).

In addition, simply naming a state official rather than the state itself does not obviate all Eleventh Amendment concerns. If the state is the real party in interest, even a decree directed against an official is barred by the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984). In *State of Missouri v. Fiske*, 290 U.S. 18 (1933), this Court held that the Eleventh Amendment barred a supplemental or ancillary bill designed to prevent the state from maintaining a suit in its

own court. While the order entered below does not completely prohibit the state from maintaining its suit, it certainly does restrict the remedies that will be available to the state. Petitioner submits that the order below operates against the state just as much as did that in *Fiske*, and that the state is the real party in interest.

The doctrine of *Ex parte Young* is simply inapplicable to this factual situation. As this Court explained in *Pennhurst State School & Hospital v. Halderman, supra* at 102, the theory of *Young* was that the state statute was unconstitutional and therefore, "void." This Court further noted that this theory "has not been provided an expansive interpretation." The court below, however, did not hold the Missouri Reimbursement Act unconstitutional or void. The court specifically notes that the District Court's order does not diminish or extinguish the petitioner's claim against respondent. Appendix A, p. A-12 n.7. As explained in Point II, *infra*, the respondent's preemption argument is not a federal *claim*. Rather, it is a defense to which *Young* is simply inapplicable. Thus, this factual situation does not fall within the parameters of *Young*, and the court's reliance thereon would constitute a major expansion of its scope. Again, this sort of "judicial misapprehension" can only be corrected by this Court.

II.

THE COURT BELOW ERRONEOUSLY CONCLUDED THAT THE DISTRICT COURT POSSESSED JURISDICTION UNDER RULE 69 OF THE FEDERAL RULES OF CIVIL PROCEDURE TO ISSUE A DECLARATORY JUDGMENT THAT THE MISSOURI INCARCERATION REIMBURSEMENT ACT, WHICH WAS THE BASIS FOR AN INDEPENDENT ACTION IN STATE COURT, WAS PREEMPTED BY FEDERAL LAW AND TO ENTER INJUNCTIVE RELIEF AGAINST THE STATE RESTRICTING ITS REMEDIES IN THE STATE COURT ACTION, DESPITE THE FACT THAT THE FEDERAL JUDGMENT WHICH ALLEGEDLY PROVIDED THE BASIS FOR THE DISTRICT COURT'S ACTION UNDER RULE 69 HAD ALREADY BEEN SATISFIED.

Rule 69(a) of the Federal Rules of Civil Procedure provides, in part, as follows:

> Process to enforce a judgment for the payment of money shall be a writ of execution unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

The courts below concluded that this provision provided jurisdiction for the District Court to enter declaratory and injunctive relief regarding whether or not the state's claim for reimbursement of incarceration costs was preempted by 42 U.S.C. § 1983. The courts reached this conclusion despite the fact that the

judgment had in fact been paid.[4] The Court of Appeals summarily held, without citation of any authority, that Rule 69 was applicable in a situation in which a judgment has actually been satisfied. The cases relied upon by the court below involved situations in which the judgment had remained unsatisfied. *Argento v. Village of Melrose Park*, 838 F. 2d 1483 (7th Cir. 1988) and *Skevofilax v. Quigley*, 810 F.2d 378 (3rd Cir. 1987). Not only did both of these cases involve situations in which the judgments remained unsatisfied, but in both cases the court looked to state law to determine whether the garnishment or indemnity action could be brought in the same litigation. For instance, in *Skevofilax, supra* at 384, the court concluded that New Jersey law "authorizes the adjudication of a dispute between a judgment debtor and a third party so as to assure the satisfaction of a judgment." Neither court below was able to identify any Missouri law authorizing, in a post-judgment proceeding, declaratory and injunctive relief which has the effect not of securing payment of a judgment but of immunizing it from claims of a nonparty. The court below concluded that despite any applicable state procedure, it retained the plenary power to enforce its commands. However, the command of the District Court, to pay a money judgment, had been obeyed. Protecting the respondent's new assets from a state law claim is not essential to a federal court's enforcing its commands. As stated by Judge Beam in his dissent:

> However, since this was a section 1983 judgment, the district court, for reasons difficult to follow from the clear language of the rule and the facts at work here, applied Fed.

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[4] Although the petitioner disputes its sufficiency for purposes of waiver, one basis for the court's conclusion that the state had waived its Eleventh Amendment immunity was that it had voluntarily paid the judgment. If the judgment was not in fact paid, the Eleventh Amendment would have prohibited the courts below from ordering the state to do so. *Blaylock v. Schwinden, supra*.

> R. Civ. P. 69(a) in an effort to help the prisoner defeat the claim of the State, a nonparty to the underlying action in federal court. Since Missouri, as indemnitor of Finnel, had, in essence, paid over to creditor Hankins the full amount of the federal court judgment, this rule was simply not applicable. The rule outlines a process to enforce an unpaid judgment through a writ of execution. When a third party holds funds of a judgment debtor, Rule 69(a) may be used to reach the funds. Here, there were no such funds remaining in the hands of the indemnitor, they were in Hankins' prison account.

Appendix, p. A-19 - A-20.

Both *Argento* and *Skevofilax* also concluded that regardless of Rule 69, they had an independent basis for jurisdiction. However, the same cannot be said in the instant case. The respondent's argument that Missouri's cause of action for reimbursement of incarceration costs was preempted by 42 U.S.C. § 1983 is simply a defense to the state's claim. In fact, that defense was raised in the state proceedings. However, constitutional issues raised simply as a matter of defense do not provide a basis for independent federal jurisdiction. Thus, respondent could neither have removed the state court proceeding to federal court, nor could he have filed an independent action for declaratory and injunctive relief.

In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court held that matters raised in defense simply do not present a federal question for purposes of determining removal jurisdiction. Instead, removal must be based upon the face of the complaint which is filed in state court. In the instant case, the state's cause of action for reimbursement of incarceration costs was based purely upon a state statute and federal law was not an essential element of the cause of action. Under 28 U.S.C. § 1441, an essential prerequisite for removal is

that the state cause of action could have originally been commenced in federal court. It is obvious that the state's petition for reimbursement would not meet that standard.

Additionally, the plaintiff's arguments could not have been asserted in a separate action for declaratory and injunctive relief. This Court has held that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950). *See also, Franchise Tax Bd. v. Construction Laborers Vacation Trust, supra* at 16-17. Thus, when a declaratory judgment action would simply seek an adjudication of a defense to either a threatened or pending state cause of action, there is no federal question jurisdiction because such a preemptive assertion of a defense does not assert a claim arising under federal law. *See also Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 2.37 (1952).

Petitioner submits that the respondent in this case used the motion under Rule 69 as a means of circumventing his inability to either remove the state cause of action to federal court or file an independent cause of action. The use of Rule 69 under the circumstances amounts to an expansion of federal court jurisdiction, despite the fact that Rule 82 of the Federal Rules of Civil Procedure provides that the rules shall not be construed to extend the jurisdiction of the United States district courts. Petitioner believes that this is a particularly egregious action in this case because the expansion of jurisdiction runs counter to the Eleventh Amendment to the United States Constitution as explained in point I. In *Argento* and *Skevofilax*, the parties against whom the garnishment or indemnity claims were being asserted were not entities protected by the Eleventh Amendment and could have been joined in the case originally. The same cannot be said in the instant case and the court's misuse of Rule 69 becomes even more significant.

III.

THE COURT BELOW ERRED IN HOLDING, WITHOUT ANY FACTUAL BASIS, THAT THE PROVISIONS OF THE MISSOURI INCARCERATION REIMBURSEMENT ACT WERE IN CONFLICT WITH 42 U.S.C. § 1983 ALLEGEDLY BECAUSE NEITHER THE STATE NOR ITS EMPLOYEES WOULD HAVE AN INCENTIVE TO COMPLY WITH FEDERAL AND CONSTITUTIONAL RIGHTS OF INMATES.

Under the Missouri Incarceration Reimbursement Act, the state may file an action for recovery of the costs of care of an inmate. No more than 90% of the value of an inmate's assets may be recovered in such an action. § 217.833.1. (The assets of a prisoner do not inclucle his homestead up to $50,000.00 in value or up to $2,500.00 in savings from wages or bonuses while in the Department of Corrections.) Under this act, the state is not automatically entitled to 90% of the inmate's assets because, at the hearing, the Circuit Court must consider any legal or moral obligations the inmate has for support of dependents. § 217.835.4. Finally, the state is not authorized to file such an action unless the inmate has sufficient assets to recover not less than 10% of the costs of his incarceration or 10% of such costs for two years, whichever is less.

At the outset it should be noted that the court below did not invalidate the state's statutory claim for reimbursement of incarceration costs. Therefore, an inmate's liability for such reimbursement remains a valid debt. The court below, however, held in summary fashion, without any factual record, that to allow the state to recover incarceration costs from the proceeds of a judgment rendered against a state employee under 42 U.S.C. § 1983 would destroy any incentive the state or its employees had to comply with federal or constitutional law. On that basis, the court concluded that the Missouri statute was inimical to the

aims of 42 U.S.C. § 1983 and preempted thereby by virtue of the Supremacy Clause to the United States Constitution. Petitioner submits that in so holding the court below ignored the principles enunciated by this Court regarding consideration of claims arising under the Supremacy Clause.

The starting point for consideration of claims of this nature must be the fact that there is a presumption against preemption of a state's historic police powers. As this Court stated in *Cipollone v. Liggett Group, Inc.*, 505 U.S. __, 112 S.Ct. 2608, 2617 (1992):

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the state [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."

Thus, this Court characterized congressional purpose as the "ultimate touchstone" of preemption analysis. Congressional intent may be either explicitly expressed within the statute's language or implicitly contained in its structure and purpose. Neither the District Court nor the Court of Appeals below directly held that 42 U.S.C. § 1983 contained any express congressional direction regarding preemption of the claim of the state of Missouri in this case. The District Court did cite to this Court's opinion in *Bennett v. Arkansas*, 485 U.S. 395 (1988) in which an Arkansas claim for incarceration reimbursement costs was held to be inconsistent with an express provision of the Social Security Act which exempted social security benefits from attachments. The Court of Appeals did not even refer to *Bennett* but did cite this Court's opinion in *Rose v. Arkansas State Police*, 479 U.S. 1 (1986). In that case, this Court held that federal benefits under the Public Safety Officer's Death Benefits Act, 42 U.S.C. § 3796, *et seq.*, barred the state of Arkansas from using the federal benefits to offset a state workers' compensation award. This result was based upon the fact that the federal act

specifically provided that the benefits thereunder were "in addition" to any other benefits. Thus, although these cases are referred to in the opinions below, they are irrelevant to the ultimate holdings of both the District Court and Court of Appeals which were based upon an implicit congressional purpose to preempt state law under these circumstances.

According to this Court, "in the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law . . . or federal law so thoroughly occupies a legislative field" as to leave no room for the state to act. *Cipollone,* supra at 2617. However, neither the District Court nor the Court of Appeals relied upon the latter rationale. The issue of preemption, therefore, becomes solely whether allowing the state to seek reimbursement for incarceration costs out of the proceeds of a federal judgment under 42 U.S.C. § 1983 would actually conflict with federal law.

The question of an alleged conflict between federal and state law in this case is not one of absolute impossibility. There is no question that both federal and state law could be followed in this instance. The court below concluded, however, that state law in this instance stood as an obstacle to the accomplishment of the objectives of Congress in enacting 42 U.S.C. § 1983. The court held that to allow the state of Missouri to seek partial reimbursement for incarceration costs from the proceeds of a federal judgment would mean that the state and its employees would have no incentive to comply with federal or constitutional law. That, however, is a factual conclusion for which there is simply no support in the record. The respondent never offered any evidence in support of his preemption argument. Nor did the District Court order a hearing to take evidence on the issue.

It is patently obvious from the language of the Reimbursement Act that it does not apply to all judgments awarded an inmate. Before the state can file an action, there must be a reasonable

expectation of recovering at least 10% of the incarceration costs or 10% of the costs for two years, whichever is less. Although the costs for incarceration vary between Missouri institutions and from year to year, it is probably safe to conclude that any judgment below $2,000.00 would be exempt from the act. Petitioner submits that the great majority of settlements and/or jury awards entered in civil rights actions over the last couple of years fall into this category and could have offered such evidence to the District Court. As to larger awards, the state could never recover more than 90% and thus a significant amount of an inmate's assets would be beyond the state's claim for reimbursement. For instance, assuming an award of $30,000.00, the state could recover a maximum of $27,000.00, which would leave the inmate with assets of $3,000.00 which is exactly what the jury verdict was in the instant case. In addition, as Judge Beam astutely noted in his dissent (Appendix A, p. A-20 n.3) "the award of attorney's fees to the plaintiff often, if not usually, far exceeds the amount of the § 1983 judgment." The petitioner could have offered evidence of precisely the situation contemplated by Judge Beam. There have been instances in which a jury awarded nominal or very small amounts in which the courts have awarded several thousand dollars in attorney's fees. The court below expressly noted this Court's holding in *Hayfield Northern Railroad Co. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622, 628 (1984), that when federal law does not expressly preempt state law, the court "must inquire more deeply into the intention of Congress and the scope of the pertinent state legislation." There was simply no such inquiry in the present case. Petitioner submits that before either the District Court or Court of Appeals could conclude that the Incarceration Reimbursement Act destroys any incentive to comply with federal or constitutional law, they should have examined the facts to see exactly how much of an impact the Act would have upon the state's monetary liability. Petitioner submits that if there had been such an inquiry, the evidence would have shown that

allowing the state to proceed with its reimbursement claim would not have significantly diminished any monetary incentive to comply with federal or constitutional law.

The District Court also concluded that allowing the state to proceed with its reimbursement claims would disincline inmates from filing suits pursuant to 42 U.S.C. § 1983. Appendix B, p. A-34. This was not specifically adopted by the Court of Appeals in its opinion. In any event, as Judge Beam noted in his dissent, "any witness to the flood of prisoner petitions from the correctional facilities of this country will recognize this argument as fanciful." Appendix A, p. A-20 n.3. Judge Beam went on to note that only a portion of any judgment would be subject to reimbursement claims and that equitable remedies would still be available. "With these remedies and this knowledge in mind, it is almost certain that the actions of Missouri in this case, even if successful, will have absolutely no effect upon the number of prisoner claims asserted." *Id.*

In the absence of any factual record, one can only deal with this issue in the abstract. However, even in this sense, the analysis of the court below is deficient. The court below claimed that it was simply unnecessary to even consider whether a civil rights awards were subject to setoffs or counterclaims. Petitioner disagrees. The most analogous situation petitioner was able to find involved 31 U.S.C. § 3728 which specifically authorizes the federal government to a setoff on a judgment rendered against it for any debts owed to it by the judgment creditor. Quite apart from the statutory authorization, this is also a common law right. In *United States v. Cohen,* 389 F.2d 689, 690-91 (5th Cir. 1967), the court stated:

> Under the most recent statute, it is the duty of the Comptroller General to withhold payment of a judgment creditor as an off-set against the indebtedness of that creditor to the United States. He does so not only by statutory authority,

> but also in "exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." Like other creditors, the United States may assert this right to set-off against parties who are claiming rights derivatively from other parties against whom set-off would unquestionably be proper.

(Footnotes omitted.) In that case, a federal inmate had prevailed against the federal government under the Federal Tort Claims Act based upon an assault by a fellow inmate and was awarded $110,000.00. The plaintiff, however, owed taxes to the federal government in the amount of $393,469.65 which offset the entire judgment. *See also* Morgan v. United States, 131 F.Supp. 783 (S.D. N.Y. 1955).

Petitioner brought to the court's attention below several instances in which state employees had prevailed on counterclaims against civil rights plaintiffs. While large portions of those judgments may remain unpaid, should any of those inmates prevail in a civil rights suit in the future, petitioner sees no reason why any such future recovery would not be subject to being used to pay off the existing judgments against them. In short, it appears that there is no policy that would immunize the proceeds of civil rights judgments from counterclaims or setoffs. Valid setoffs and counterclaims are simply not inconsistent with 42 U.S.C. § 1983 or a frustration of its purposes. Since the state of Missouri has a valid claim against the respondent, it submits that there is no reason why it should not be allowed to pursue that claim even though a portion of a civil rights judgment against one of its employees would provide the assets out of which it could recover.

The court below relies upon the opinion in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). In *Bell*, however, the issue was not preemption. Rather, the issue was whether, under

42 U.S.C. § 1988, certain provisions of Wisconsin law regarding the statute of limitations, survivability of tort actions, and availability of punitive damages would apply in a federal civil rights action. In the instant case, the District Court was not being asked to apply any provision of state law with regard to the underlying civil rights action. The state of Missouri was not even a party to that proceeding, and the former state employee who was the only defendant, would have had no authority to have pursued the reimbursement claim. Neither did the former employee ask the court to apply any other provision of state law during the trial. To say, as did the Seventh Circuit, that the District Court correctly refused to apply provisions of state law when it was requested to, provides no basis for holding that a federal court may interfere with a separate state court action as the court did in this case.

In summary, petitioner submits that the court below erred in three respects. First, it should not have reached the merits of the preemption claim at all. That should have been dealt with as a defense to the state court action. Second, having concluded that there was federal jurisdiction, the court erred in holding that, on its face, the Missouri Incarceration Reimbursement Act was in conflict with and frustrated the aims of 42 U.S.C. § 1983. Third, since there was no facial conflict between federal and state law, the court erred in failing to make any factual inquiry on the issue.

CONCLUSION

Because the court below ignored established principles regarding the sovereign immunity of the State of Missouri, the proper role of a post-judgment motion under Rule 69 and, without the benefit of any factual record, held a state law implicitly preempted by federal law, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1299

Ronald Hankins,
Appellee,

v.

William C. Finnel; State of Missouri,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: September 9, 1991
Filed: May 22, 1992

Before ARNOLD,* JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The State of Missouri and William Finnel appeal from a district court[1] judgment enjoining the State of Missouri from attaching funds it had just paid Ronald Hankins to satisfy a judgment against its former employee, William Finnel. A jury had awarded Hankins $1 in nominal damages and $3,000 in punitive damages after finding that Finnel had sexually molested Hankins during the time that Finnel taught school at the Missouri State Penitentiary and Hankins was an inmate there. Shortly

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*The HONORABLE RICHARD S. ARNOLD became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

[1] The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

after this court affirmed the judgment, the State brought an ex parte action in the circuit court of Cole County, Missouri, seeking reimbursement for the cost of Hankins' incarceration pursuant to the Missouri Incarceration Reimbursement Act, Mo. Rev. Stat. §§ 217.825 - 217.841 (Supp. 1991). The State sought reimbursement equal to ninety percent of Hankins' judgment. The Cole County Circuit Court appointed a receiver to take control of the money paid to Hankins and later stayed proceedings pending the outcome of this action. The district court held that it had ancillary jurisdiction under Fed. R. Civ. P. 69(a), that the State waived its Eleventh Amendment immunity to the extent that it voluntarily accepted the obligation of the judgment against Finnel, and that the Supremacy Clause barred application of the Missouri reimbursement statute. *Hankins v. Finnel*, 759 F. Supp. 569 (W.D. Mo. 1991). On appeal, the State argues that it has not waived its Eleventh Amendment immunity, that the district court lacked jurisdiction under Rule 69(a), that federal law does not preempt the Missouri Incarceration Reimbursement Act, and that the district court should have abstained. We affirm the judgment of the district court.

In 1988, Hankins sued Finnel in the district court for the Western District of Missouri, alleging that while he was an inmate in the penitentiary, Finnel sexually harassed or molested him on four occasions. Hankins attended the penitentiary school where Finnel was an instructor. The case was tried to a jury, which found for Hankins on his 42 U.S.C. § 1983 (1988) claims and awarded $1 nominal damages and $3,000 punitive damages. This court affirmed the judgment. *Hankins v. Finnel*, No. 89-2715 (8th Cir. June 29, 1990). The Attorney General of the State of Missouri represented Finnel at trial and on appeal. The State also agreed to indemnify Finnel for any judgment against him pursuant to the statute entitled "State Legal Expense Fund," Mo. Rev. Stat. § 105.711 (Supp. 1991).

On July 31, 1990, the State initiated ex parte proceedings in the Cole County Circuit Court attempting to obtain ninety percent of the money it was to pay to Hankins as a result of the judgment against Finnel. Under the Missouri Incarceration Reimbursement Act, the State may seek reimbursement of up to ninety percent of a prisoner's assets, which are defined to include a money judgment received from the State as a result of a civil action against one of its employees. Mo. Rev. Stat. § 217.817(1)(a).

The circuit court appointed a receiver to hold the funds in Hankins' inmate account and ordered Hankins to show cause why an order should not be entered appropriating his assets to reimburse the State for the cost of his confinement. Three days after the circuit court's August 17, 1990, order, Hankins' account was debited by $3,234.22 for "cell reimbursement." On that same day, the State deposited the identical amount (representing the $3,000 judgment plus interest) into Hankins' overdrawn account.[2]

In November, Hankins returned to the district court, filing motions for a writ of mandamus to stay the state court proceedings and to proceed in aid of execution on the judgment. Before the district court could rule on the mandamus motion, the state court stayed its proceedings, making Hankins' first motion moot. *Hankins*, 759 F. Supp. at 570.

Addressing Hankins' other motion, the district court cited its authority under Fed. R. Civ. P. 69(a) to enforce its judgment and conduct proceedings in aid of execution. *Id.* at 571. Because the federal statute under which Hankins sued, 42 U.S.C. § 1983 (1988), provides no mechanism for enforcement of a judgment,

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[2] Although the State claimed in the state court filings that it sought only $2,910.80, it debited Hankins' account by $3,234.22. Before the Debit, Hankins' account balance was $33.78.

the district court determined it must rely on Missouri law on that issue. The court concluded that Missouri law empowered it to conduct "proceedings in prohibition" under Mo. Rev. Stat. § 530.010 (1986). *Id.* It also cited federal case law permitting federal courts to exercise jurisdiction over nonparties that have an obligation to indemnify the judgment debtor. *Id.* The district court concluded that because the State of Missouri had consented to satisfy the judgment, the court retained ancillary jurisdiction to enforce that judgment. *Id.*

The district court next concluded that the Eleventh Amendment did not bar enforcement of the judgment against the State, as the State had waived its immunity to the extent that it had voluntarily agreed to indemnify its employee, Finnel, and had acted in his stead. *Id.* at 572. The district court stated: "Where the State has stepped in to satisfy the judgment against Mr. Finnel, the State cannot then assert its Eleventh Amendment immunity to circumvent the Court's authority to enforce that judgment." *Id.*

The district court next addressed the conflict between 42 U.S.C. § 1983 and the Missouri Incarceration Reimbursement Act. The court concluded that although no provision in section 1983 "expressly conflicts with the state's right to attach a prisoner's assets," *id.* at 573, the Missouri Reimbursement Act nonetheless thwarts the objectives of section 1983. *Id.* at 574. The court explained: "If the State were permitted to seize the Section 1983 damage awards prisoners receive for prison employees' conduct, the prisoners would have no motive to bring such suits and the State and its employees would have no inducement to comply with federal law." *Id.* The court concluded that the Supremacy Clause invalidated the Missouri statute as applied in this case because it conflicted with section 1983. *Id.*

The district court thus enjoined the State from attaching the funds the State had just paid Hankins. This appeal followed.

I.

Finnel and the State of Missouri[3] argue that the district court erred in concluding that the State had waived its immunity under the Eleventh Amendment. The district court did not find a "general waiver," but concluded that the State had waived its immunity with regard to the judgment in this case by "agree[ing] to indemnify" Finnel and then "stepp[ing] in to satisfy the judgment." *Hankins*, 759 F. Supp. 572.

The State asserts that its statute authorizing representation and indemnification of employees who are sued does not constitute an express or implied waiver of the State's Eleventh Amendment immunity. It further contends that its issuance of the check to Hankins[4] does not establish an implied waiver because no official, including the State's Attorney General, can waive the Eleventh Amendment by his actions. Only the Missouri Assembly, it asserts, can waive the State's immunity, and only by enacting general legislation.

As the State acknowledges, the Eleventh Amendment bar is not absolute. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). In certain instances, Congress may abrogate the states' sovereign immunity, or a state may consent to suit in federal court. *Id.* Because the "Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), the Supreme Court has

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[3] The two appellants will be referred to throughout the rest of our discussion as "the State." Although the State was not a party in the proceedings below, *Hankins*, 759 F. Supp. at 571-72, it filed a joint notice of appeal with Finnel..

[4] Hankins never actually received the check. The money was deposited in his account the same day that his account was debited for "cell reimbursement." His account record lists the debit before the credit.

prescribed a stringent test for determining the existence of a waiver. A waiver must be " 'stated by the most express language,' " or, if implied, it must appear " 'by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Feeney*, 495 U.S. at 305 (quoting *Atascadero State Hosp.*, 473 U.S. at 239-40, and *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation omitted)).

A state may also waive its Eleventh Amendment immunity through conduct. *Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984). Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits. *See Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). In *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880 (1st Cir. 1984), *Cert. denied*, 469 U.S. 1191 (1985), a governmental corporation "not only appeared but filed a counterclaim and a third-party complaint." *Id.* at 886. The First Circuit thus had "little trouble concluding that [the corporation] voluntarily submitted to the jurisdiction of the federal court, thereby waiving any Eleventh Amendment immunity . . . ." *Id.*

An Eleventh Amendment waiver need not be a general waiver, but may be a partial or limited one. *See WJM, Inc. v. Massachusetts Dep't of Pub. Welfare*, 840 F.2d 996, 1002-03 & n.8 (1st Cir. 1988) (by filing proofs of claim in debtors' Chapter 11 bankruptcy proceedings, State of Massachusetts made a "partial" waiver of its Eleventh Amendment immunity, exposing itself only to the debtors' claims that arose out of the same transaction or occurrence as its own claims against the debtor), *overruled in part on other grounds, Reopell v. Massachusetts*, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S. Ct. 637 (1991); *Moreno v. University of Maryland*, 645 F.2d 217, 220 (4th Cir. 1981) (state waived its immunity to the extent that it obtained a stay of a district court order pending appeal by agreeing to pay refunds to university students if the order was upheld on appeal), *aff'd, Toll v. Moreno*, 458 U.S. 1 (1982). The district court here

stressed the limited nature of the waiver, specifically stating that the State had not made a "general waiver." *Hankins*, 759 F. Supp. at 572. The State waived its immunity only "as it pertains to the judgment in this case." *Id.*

The State attacks the district court's determination, pointing to language in a Missouri state statute which declares that "[n]othing in sections 105.711 to 105.726 [the sections covering the State Legal Expense Fund] shall be construed to broaden the liability of the state of Missouri . . . nor to abolish or waive any defense at law which might otherwise be available to any agency, officer, or employee of the state of Missouri." Mo. Rev. Stat. § 105.726 (1986). This statute, the State asserts, clearly declares the State's intention not to waive its Eleventh Amendment immunity by representing or indemnifying state employees.

The State also relies on a trio of Federal decisions in which the courts determined that statutes authorizing the state to represent or indemnify employees sued in connection with their official duties do not waive Eleventh Amendment immunity. For example, in *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), the court concluded that an Alabama statute authorizing the State to pay up to $100,000 for judgments awarded against officials and employees of the Board of Corrections did not waive the State's Eleventh Amendment immunity. *Id.* at 1377-78. The court relied in part on express language in the statute stating that "[n]othing in this section shall be deemed to waive the sovereign immunity of the [S]tate . . . ." *Id.* at 1378 (citing Ala. Code § 41-9-74(c)). Two district court decisions construing similar statutes also found no waiver of sovereign immunity. *See United States v. DCS Dev. Corp.*, 590 F. Supp. 1117, 1120-22 (W.D.N.Y. 1984) (statute authorizing state to represent and indemnify employees sued in connection with their official duties and attorney general's subsequent appearances in case do not add up to a waiver of Eleventh Amendment immunity); *Elliott v. Hinds*, 573 F. Supp. 571, 575 (N.D. Ind. 1983) (attorney general's representation of state

employee under terms of state statute does not waive Eleventh Amendment immunity).

We recognize that the State of Missouri, in section 105.726, clearly expressed its intent not to waive sovereign immunity by its enactment of certain statutes. That section disavows waiver, however, only with regard to the statutes that pertain to the State Legal Expense Fund; it says nothing about the Missouri Incarceration Reimbursement Act.

The cases that the State cites also are not dispositive of the issue before us. *Williams, DCS Development Corp.*, and *Elliott* all address the argument that a state indemnification statute waived the state's immunity so that the state or its agencies could be sued for money damages, or its employees could be sued for damages in their *official*[5] rather than individual capacities. *See Williams*, 689 F.2d at 1376; *DCS DEv. Corp.*, 590 F. Supp. at 1121; *Elliott*, 573 F. Supp. at 574-75. In both of these situations, the plaintiff seeks an award of damages from the state treasury. In this case, however, the state employee was sued in his *individual* capacity and damages were awarded against him as an individual. The State voluntarily entered the picture by agreeing to pay the judgment. The issue is not whether the State has waived its immunity so that it can be sued as a defendant in the main action, or its officials can be sued in their official capacity, but rather whether the State's actions in satisfying Hankins' judgment and then immediately attempting to recoup it can be deemed a limited waiver of immunity *solely with regard to the judgment*.

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[5] In an official-capacity lawsuit, the State is considered the real party in interest, *Carr v. City of Florence*, 916 F.2d 1521, 1524 (11th Cir. 1990), because relief is sought directly from the state treasury. *Lawson v. Bouck*, 747 F. Supp. 376, 380 (W.D. Mich. 1990). In an individual capacity lawsuit, relief is sought from the individual, even though liability is predicated upon actions taken by that individual in his official capacity. *Id.*

Although the State agreed to pay Hankins' judgment, it voluntarily and deliberately took actions designed to ensure that the money never reached Hankins' hands. The State initiated the ex parte action in state court three weeks before it credited Hankins' account. Although aware that Hankins was represented by appointed counsel, the State appeared ex parte before the State court and obtained orders to show cause and appointing a receiver. The State acted pursuant to the Missouri Incarceration Reimbursement Act, which specifically includes in its definition of assets "[a] money judgment received by the offender from the state as a result of a civil action" against the State or one of its agencies or employees and in which the claim arose from the performance of official duties on behalf of the State. Mo. Rev. Stat. § 217.827(1)(a)(b).

The State cites no case that addresses whether a statute similar to Missouri's Incarceration Reimbursement Act waives sovereign immunity when state officials rely on that statute to recoup the judgment of an inmate who has successfully sued a state employee in federal court on a federal claim. In fact, one of the cases on which the State relies, *DCS Development Corp.*, qualifies its holding by stating that the attorney general's mere appearance in a suit does not constitute waiver "unless the Attorney General *seeks to take advantage of the suit for the benefit of the state*, or unless state law otherwise provides." 590 F. Supp. at 1121 (emphasis added). The *DCS* court then cites *Sosna*, in which the State of Iowa was deemed to have waived its Eleventh Amendment defense by entering a voluntary appearance and defending the case on the merits. 419 U.S. at 396 n.2. Under Iowa law, such an action constituted a waiver of sovereign immunity.

Although the State of Missouri never entered a general appearance in this case, it did seek to take advantage of the suit for its own benefit. By representing and indemnifying Finnel, it provided what, in essence, amounted to an employment benefit

for Finnel. Section 105.711.2(2) authorizes the expenditure of state funds when the plaintiff's claim concerns conduct "arising out of and performed in connection with [the employee's] official duties." The Missouri Incarceration Reimbursement Act then targets such judgment proceeds for recoupment by defining an inmate's "assets" to include money received from the State to satisfy a judgment against one of its employees where the inmate's claim arose from "the [employee's] conduct of official duties." Mo. Rev. Stat. 217.817(a)(a)b. In essence, the state achieves the advantage of protecting both its employees and its own coffers by paying a judgment with one hand that it intends to take back with the other.

The State's actions lefts Hankins with little more than a "stealth" payment — the judgment proceeds vanished before Hankins even knew he had been paid. For Eleventh Amendment purposes, we see little difference between this situation and a case in which a state simply reneges on its promise to pay. In *Moreno*, the Fourth Circuit found that the University of Maryland "explicitly" waived its immunity when it obtained a stay of a district court order by agreeing to pay certain tuition refunds should the order be affirmed on appeal. 645 F.2d at 220. The university failed to vindicate its position on appeal, and "so it must pay the refunds to which it agreed.," *Id.* at 221.

We conclude, based on the combination of factors present here, that the State of Missouri made a limited waiver of its Eleventh Amendment immunity with regard to the judgment in this case.[6] It is evident that the district court found a waiver only

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[6] The overly general arguments of the dissent do not merit a detailed response as they fail to focus on the narrow and unique factual situation presented in this case, which in itself is without precedent. A reading of this opinion makes it evident that it is not based upon public policy, as the dissent charges. It goes without saying that we decide only the limited issues before us and do not reach other issues that may arise in the future.

with respect to the narrow facts of this case, and we are convinced that it did not err. The State, acting under statutory authority, represented Finnel at all stages of the litigation and agreed to indemnify him. It then "paid" the judgment, but not before instituting a state court proceeding attempting to recoup it. The State took these actions ex parte despite its knowledge that Hankins was represented by counsel. The ledger sheet from Hankins' inmate account lists a $3,234.22 debit for "Cell Reimbursement" just before it lists the credit from the State of Missouri in the identical amount. The debit and credit were both entered on August 20, 1990, about three weeks before the State notified Hankins of its action. In sum, the State acted to the advantage of and for the benefit of itself.

The State of Missouri also argues that the Attorney General does not possess the authority to waive the Eleventh Amendment by his mere actions and that only the General Assembly can waive immunity and only by enacting general legislation. This argument overlooks the fact that the Attorney General acted under the authority of state statutes. Although the Missouri legislature expressly declared that the statutes governing the State Legal Expense Fund do not Waive any immunity defense, *see* Mo. Rev. State. § 105.726, it included no such language in the Missouri Incarceration Reimbursement Act.

We further observe that even without the existence of the waiver, Hankins still would be entitled to proceed in district court. Although the district court could not, in the absence of a waiver, enjoin the *State* from attaching Hankins' funds, it could enjoin *state officials*. *See Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 100-03 (1984). The Eleventh Amendment bars a federal court from awarding retroactive monetary relief against a state or its official (when sued in their official capacity), but it does not bar a federal court from issuing an injunction ordering

a state official to comply in the future with federal law.[7] *Id. See also Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). The State of Missouri, through its responsible officials, parted with the $3,234.22 at issue in this case when Hankins' account was credited with this amount. That the same or other state officers then seized this fund under Missouri Incarceration Reimbursement Act does not relieve the officials taking possession of this fund from liability to pay the money in response to a court order directed to those individuals, and limited to the funds seized. The type of relief sought here[8] is prospective and injunctive, and thus is not barred by the Eleventh Amendment provided that the court directs any order toward state officials, not the State. Determining the identity of the necessary officials is a matter the district court may address if need be.

II.

The State next argues that the district curt lacked jurisdiction under Fed. R. Civ. P. 69(a), which governs execution, to decide whether 42 U.S.C. § 1983 preempts the Missouri Incarceration Reimbursement Act.

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[7] We are aware of *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), in which eight justices held that the Eleventh Amendment barred a federal court from adjudicating a State's interest in specific property without the State's consent. *Id.* at 682 (plurality), *id.* at 703 (White, J., concurring in judgment in part, dissenting in part.) We conclude that *Treasure Salvors* does not control this case. Here, the district court would not be deciding the State's interest in a *res*, but would simply be enjoining state officials from attaching certain funds to which Hankins now holds title. The district court's order would not diminish or extinguish the State's claim against Hankins, and thus does not run counter to *Treasure Salvors*. Nothing in the district court's order prevents the State from seeking reimbursement out of Hankins' other assets.

[8] The State repeatedly asserts the judgment has been paid. Thus, the district curt's order would only be aimed at releasing Hankins' account from the receiver's control.

The district court primarily relied on *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988), in which the Seventh Circuit held that a district court could properly retain jurisdiction under Rule 69(a) to enforce a judgment against nonparties that were responsible for indemnifying the judgment debtors. *Id.* at 1487-90. The Seventh Circuit saw "no reason" to draw a distinction, for purposes of supplemental jurisdiction, between parties and nonparties, *Id.* at 1488, as the nonparties' liability to the defendants was "related to the same events that underlie the original . . . action." *Id.* at 1490.[9]

The State challenges the district court's reliance on *Argento*, arguing that: (1) a municipality, not a state, was obligated to indemnify the public employee in *Argento*; (2) the State of Missouri is not under a judicially enforceable obligation to indemnify its employees; (3) once a judgment is paid, Rule 69 does not apply; and (4) the supplemental proceedings in this case constituted a separate action over which the district court lacked jurisdiction.

Most of these arguments do not demand extensive discussion. The fact that *Argento* dealt with a municipality rather than a state is irrelevant for purposes of Rule 69. The State's Eleventh Amendment concerns simply do not bear on this issue.

We need not answer the State's argument that it is not under a judicially enforceable obligation to pay, as the State claims throughout its brief that the judgment has been satisfied and the record of Hankins' account shows a $3,234.22 credit from the State of Missouri on August 30, 1990.

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[9] *See also Skevofilax v. Quigley*, 810 F.2d 378, 385 (3d Cir.) (district court has ancillary jurisdiction to adjudicate a garnishment action by a judgment creditor against a nonparty to the action that may owe an obligation to indemnify the judgment debtor), *cert. denied*, 481 U.S. 1029 (1987).

The State next argues that once a judgment is paid, Rule 69 is no longer applicable. We are not persuaded by this argument. The State has, in essence, devised what the district court called a "shell game" that allows it to "pay" a judgment while simultaneously recouping the proceeds. The actions of the State, in commencing the ex parte proceedings in state court and making its deposit in Hankins' overdrawn account, must be seen as an effort to prevent Hankins from collecting his judgment in the first place.

The State characterizes its claim for reimbursement as a completely independent claim brought under state law and properly adjudicated in state court. We reject this characterization. The issue is whether the State's claim for reimbursement is "adequately related," *see Argento* , 838 F.2d at 1490, to Hankins' original civil rights action to fall within the parameters of ancillary jurisdiction pursuant to Rule 69.

The State's statutory scheme — authorizing indemnification of state employees who are sued in connection with their official duties and then targeting such judgment proceeds for a reimbursement claim by the State — has the effect of defeating the efforts of any inmate to actually collect his judgment and completely vitiates any deterrent value these judgments possess. Because the State's scheme has the potential to severely frustrate the enforcement of federal rights in prisons, we conclude that the State's claim under the Missouri Incarceration Reimbursement Act is sufficiently related to Hankins' original civil rights action that it may properly be addressed in ancillary proceedings.[10] We

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[10] Because we conclude that the State's claim is not a separate and independent claim, we need not address its contentions that Hankins could not have removed the State's claim to federal court and that Hankins could not have asserted an independent claim for declaratory and injunctive relief in federal court because of the lack of subject matter jurisdiction.

observe that our discussion here necessarily touches on some of the issues that we address regarding preemption in Part III, *infra*.

Finally, the State attacks the district court's reliance on Mo. Rev. Stat. § 530.010, the MIssouri statute governing writs of prohibition. The district court recognized that 42 U.S.C. § 1983 provides no mechanism for enforcing a judgment, *Hankins*, 759 F. Supp. at 571, so it relied on Rule 69, which provides that proceedings under its authority "shall be in accordance with the practice and procedure of the state in which the district court is held . . . except that any statute of the United States governs to the extent that it is applicable." The State argues that the Missouri statute is intended to "prevent a usurpation of judicial power" and provides no procedural basis for the district court's actions.

We need not address the applicability of section 530.010 to this case. Even accepting the State's argument that it is irrelevant, we conclude that the district court retains "plenary power to enforce its commands." *Spain v. Mountanos*, 690 F.2d 742, 747 (9th Cir. 1982). Where state law fails to supply the necessary procedure, or actually stands in the way of enforcement, the district court may take the necessary steps to ensure compliance with its judgment. *See Gary W. v. Louisiana*, 622 F.2d 804, 806-07 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980). *See generally* James W. Moore et al., Moore's Federal Practice ¶ 69.04[3] (1991). We also observe that the district court may rely on Fed. R. Civ. P. 70, which permits it to invoke its equitable powers in enforcing a judgment. *See Spain*, 690 F.2d at 744-47; *Gates*, 616 F.2d at 1271-72.

III.

Under the Supremacy Clause, state law is preempted whenever it "contradicts or interferes with an Act of Congress." *Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627 (1984). *See also Rose v. Arkansas State Police*,

479 U.S. 1, 3 (1986). Federal law preempts state law not only where the two are plainly contradictory but also where "the incompatibility between [them] is discernible only through inference." *Hayfield Northern R.R. Co.*, 467 U.S. at 627. When federal law does not expressly preempt state law, the court "must inquire more deeply into the intention of Congress and the scope of the pertinent state legislation." *Id.* at 628. Preemption in this instance will arise when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The purpose of section 1983 is two-fold: to compensate victims and to deter future deprivations of federal constitutional rights. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984). In *Bell*, the Seventh Circuit refused to apply a Wisconsin statute that precluded damages to an estate for loss of life and also precluded recovery of punitive damages. The court concluded that both provisions undermined the purpose of section 1983. *Id.* at 1236-41. With regard to the punitive damages provision, the court stated: "To disallow punitive damages in Section 1983 actions solely on the basis of restrictive state tort law would seriously hamper the deterrence effect of Section 1983." *Id.* at 1241.

The jury in this case awarded Hankins $1 in nominal damages and $3,000 in punitive damages. To allow the State to largely recoup this award would be inimical to the goals of the federal statute. As the district court observed, "neither the State nor its employees would have the incentive to comply with federal and constitutional rights of prisoners." *Hankins*, 759 F. Supp. at 574.

We thus conclude that section 1983 preempts the Missouri Incarceration Reimbursement Act as it is applied in this case. To

the extent that the Act permits the State to recoup the very monies it has paid to satisfy a section 1983 judgment against one of its employees, the Act is invalidated under the Supremacy Clause.

The State also argues that its claim under the Reimbursement Act is analogous to a counterclaim or setoff and should be permitted on that basis. This argument is beside the point when the issue is one of preemption.

IV.

The State finally asserts that the district court erred in failing to abstain in deference to pending state judicial proceedings. We see no reason to apply the abstention doctrine where important federal interests are at stake and where the proceedings were ancillary to a judgment awarded in federal court.

For the foregoing reasons, we affirm the judgment of the district court.

BEAM, Circuit Judge, dissenting.

Because the majority opinion disregards accepted legal principles applicable to cases such as this, I respectfully dissent. Without reason or precedent, the district court, advancing dubious policy justifications, has elevated the 42 U.S.C. § 1983 judgment against Finnel to a status that it does not merit. Further, the district court used an inapplicable procedural rule, Fed. R. Civ. P. 69(a), to cut a pathway for this prisoner-plaintiff through immunity barriers erected by the Constitution.

Finnel was an employee of the State of Missouri and, while serving in this capacity, violated the constitutional rights of Hankins. The cause of action was against Finnel in his personal capacity and sought to (and did) impose personal liability. The suit was not and could not have been an official capacity case. "[O]fficial capacity suits . . . represent only another way of pleading an action against an entity of which an officer is an

agent." *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.55 (1978). Of course, the Eleventh Amendment precluded a suit by Hankins directly against the State of Missouri. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). To repeat, the State of Missouri was not and could not have been the object of Hankins' claim.

The state enters the picture in only a limited way—through its statute-making powers. Missouri, furnishing an additional benefit to its workers, provides and pays for a lawyer when a state employee is sued for task-related activities and, through the State Legal Expense Fund, Mo. Rev. Stat. § 105.711 (Supp. 1991), indemnifies the employee for any judgment rendered. Some states use tax money to buy commercial insurance coverage while others, like Missouri, appropriate an indemnity fund, a form of self-insurance. So Finnel was, in essence, provided indemnity coverage by the State to satisfy his liability to Hankins.

The judgment was entered and the State paid off. It satisfied the judgment, as Finnel's indemnitor, by paying the money into Hankins' account at the institution. Since Hankins could not carry cash around in prison, it was necessary for the money to be handled this way. Perhaps if he had had another bank account or a legal guardian, his lawyer could have had the tender transferred to him in some way. Presumably Missouri could also have paid the money into the registry of the federal court. In any event, Missouri had (and should have had) access to the funds now owned by Hankins. That the satisfaction of judgment was handled through Hankins' prison account or in any other way is irrelevant to the legitimate issues in this case.

In a separate state court proceeding, under Missouri Incarceration Reimbursement Act, Mo. Rev. Stat. §§ 217.825 - 217.841 (Supp. 1991), the State impounded the money and sought a judgment against Hankins for ninety percent of the judgment payment made into the prison account. As noted by the

majority, the Reimbursement Act seeks money to repay the State for costs of Hankins' incarceration. No attack is made on the validity of the Reimbursement Act, constitutional or otherwise.[1] Had Hankins inherited money or obtained a federal court judgment for breach of contract or through a tort claim, the Act would presumably have functioned without this interference from the federal district court. However, since this was a section 1983 judgment, the district court, for reasons difficult to follow from the clear language of the rule and the facts at work here, applied Fed. R. Civ. P. 69(a)[2] in an effort to help the prisoner defeat the claim of the State, a nonparty to the underlying action in federal court. Since Missouri, as indemnitor of Finnel, had, in essence, paid over to creditor Hankins the full amount of the federal court judgment, this rule was simply not applicable. The rule outlines a process to enforce an unpaid judgment through a writ of execution. When a third party holds funds of a judgment debtor, Rule 69(a) may be used to reach the funds. Here, there were no

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[1] I suspect there are several avenues of assault available, not limited to arguments that a reimbursement amounts to an additional criminal fine or that court ordered restitution arising outside the criminal process violates due process considerations. Nothing of this nature is referred to in the record and it is doubtful that such attacks, if made, would prevail in the final analysis.

[2] Federal Rule of Civil Procedure 69(a) states:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

such funds remaining in the hands of the indemnitor, they were in Hankins' prison account.

The majority relies upon *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988), for support of the use of a Rule 69(a) procedure. Beyond the fact that the dissent in *Argento* presents the better reasoned argument, the case, and all the cases cited by the *Argento* majority, are inapposite here. None of the actions involved a sovereign state with Eleventh Amendment protections, they involved governmental subdivisions subject to being made parties to the action in the first instance. Further, *Argento* presented a situation where the section 1983 judgment against the employees remained unsatisfied, a scenario, as earlier indicated, we do not face in this matter.

The second error more directly involves the Eleventh Amendment. In support of some supposed public policy consideration involving section 1983 actions,[3] the district court and the majority seek to blur the line drawn by the Supreme Court which separates a state from its employees in this kind of litigation. The reasoning employed by the district court and the majority runs upstream from the unambiguous holdings of the Supreme Court. For instance, in *Kentucky v. Graham*, 473 U.S. 159 (1985), a successful section 1983 plaintiff sought to collect attorney fees

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[3] The district court concluded that permitting the State to seize this section 1983 damage award would disincline prisoners from bringing such damage claims and would destroy the inducement for a state and its employees to comply with the federal Constitution. Any witness to the flood of prisoner petitions from the correctional facilities of this country will recognize this argument as fanciful. Further, section 1983 carries with it equitable as well as legal remedies. The Missouri Act confiscates only a portion of each judgment and, as in this case, the award of attorney fees to the plaintiff often, if not usually, far exceeds the amount of the section 1983 judgment. With these remedies and this knowledge in mind, it is almost certain that the actions of Missouri in this case, even if successful, will have absolutely no effect upon the number of prisoner claims asserted.

allowed by 42 U.S.C. § 1988 from the Commonwealth. "[I]t is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him." *Id.* at 167-68. The Supreme Court further stated that when a party prevails against one party it has no entitlements against even another party, let alone a nonparty. *Id.* at 168. In *Brandon v. Holt*, 469 U.S. 464 (1985), the Supreme Court chastised the Sixth Circuit for failing to carefully adhere to the personal-official distinction in section 1983 litigation. *Id.* at 473.

The majority contends, in the face of this concept, that the Missouri indemnity fund legislation and/or the Missouri Reimbursement Act, jointly or severally, work an implied waiver of Eleventh Amendment immunity sufficient to bring the State into this federal court garnishment proceeding. The law is to the contrary. If waiver occurred as a result of the indemnity scheme or the Reimbursement Act, Missouri should have been made a party defendant in the underlying suit, not brought in through the back door as a quasi party. More importantly, however, applying solidly established precedent, waiver did not occur.

The Supreme Court has repeatedly rejected constructive waiver arguments such as those made here and has established that waiver can be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The Court has continuously applied this standard, construing even express state waivers of sovereign immunity very narrowly. *See Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981) (per curiam) (general statutory waiver of state agency's immunity applies only to suits in state courts and not

federal courts); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (state constitution's general waiver of state's sovereign immunity applies only to suits in state courts and not federal courts as well).

Here, the Missouri indemnity statute goes even a step further, it specifically disavows any waiver of Eleventh Amendment immunity. Even ignoring the express disavowal of waiver, the holdings of the district court and the majority are wrong given the nearly insurmountable presumption against constructive waivers of Eleventh Amendment immunity. *See Edelman*, 415 U.S. at 671-74.

In *Williams v. Bennett*, 689 F.2d 1370, 1377-79 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), and *Gamble v. Florida Dep't of Health & Rehab. Servs.*, 779 F.2d 1509, 1516-18 (11th Cir. 1986), the Eleventh Circuit has twice considered whether indemnity statutes waive immunity. *Williams* examined an Alabama statute, and, *Gamble*, as indicated, analyzed Florida law. The Alabama statute discussed in *Williams* is comparable to the Missouri legislation; it contains an express disavowal of waiver. The Eleventh Circuit found the indemnity language to be an employee benefit "analogous to liability insurance for any . . . correctional employee . . . sued individually for acts arising in the course of employment." *Williams*, 689 F.2d at 1377. A situation squarely on point with this case. Our holding should be the same as that of the *Williams* court in terms of employee benefits and waiver of immunity.

The majority's use of the Reimbursement Act as a source of limited waiver is puzzling, especially since Rule 69(a) is used as the vehicle to force payment of this judgment. Although the Act's definition of "assets" includes "[a] money judgment received by the offender from the state as a result of a civil action," Mo. Rev. Stat. § 217.827(1)(a)(b), it is difficult to even speculate how these words used by the Missouri legislature remotely

approach a waiver of sovereign immunity "by the most express language or by such overwhelming implications from the text, " *Edelman*, 415 U.S. at 673. This section merely defines the assets subject to state claims under the Reimbursement Act, it does not implicate, much less waive, Missouri's immunity in the separate and distinct federal court litigation that provides the source of the assets.

The majority nonetheless finds an implied waiver of immunity by concluding that Missouri seeks to take advantage of the judgment in Hankins' section 1983 suit through the Reimbursement Act. The majority cites *United States v. DCS Dev. Corp.*, 590 F. Supp. 1117 (W.D.N.Y. 1984), and *Sosna v. Iowa*, 419 U.S. 393 (1975), to support its findings. The majority ignores, however, that the fundamental question addressed in these cases was the extent to which state waives its immunity once it has voluntarily made an appearance in a suit. An appearance in the litigation is a prerequisite to applying the waiver standard, i.e., whether the state seeks to take advantage of the suit. As discussed above, Missouri did not waive its immunity in the section 1983 suit by satisfying Hankins' judgment. Missouri, therefore, has not appeared in the suit and does not seeks to take advantage of it in the sense that *DCS Dev. Corp.* and *Sosna* contemplate. Instead, Missouri position is comparable to that of a tort victim who decides to sue a previously insolvent tortfeasor in another court upon learning that the tortfeasor has received a judgment from a third party. By overlooking the lack of an appearance by Missouri in Hankins' section 1983 suit, the majority stretches the holdings of *DCS Dev. Corp.* and *Sosna* beyond their intended and reasonable scope.

In sum, the majority now establishes precedent for this circuit based upon erroneous policy arguments and a misapplication of

established law.[4] Accordingly, I would reverse the district court, set aside the Fed. R. Civ. P. 69(a) proceeding and let Hankins and the state settle their differences in the proper forum, the Missouri courts.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[4] Besides failing to justify the unprecedented status it accords a section 1983 judgment, the majority's holding fails to provide a workable framework for future adjudication. For example, it is far from clear whether the majority's holding would preclude a state from seeking reimbursement for prison expenses from the proceeds of a prisoner's section 1983 suit unrelated to the conditions of his imprisonment. Presumably such reimbursement would undermine the purposes of section 1983 as directly as the claim for reimbursement in the present case supposedly does. As this example demonstrates, any attempt to restrict the scope of the majority's holding would simply reveal the holding's inherently arbitrary nature.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 88-4094-CV-C-5

RONALD HANKINS,
Plaintiff,

vs.

WILLIAM FINNEL,
Defendant.

ORDER

[Filed: January 28, 1991]

Now before the Court are motions by both parties in this action which previously was tried before a jury on August 8 and 9, 1989. A judgment against Defendant William Finnel was entered on August 9 1989 and was subsequently affirmed by the Eighth Circuit. Plaintiff Ronald Hankins has filed a motion for a writ of mandamus to stay state court proceedings and a motion for proceedings in aid of execution of the judgment entered by this Court. In response, Defendant Finnel has moved to strike plaintiff's motions and has filed opposition to both motions. A state court judge stayed the state proceedings, making the first of plaintiff's motions moot.

The present motions manifest a conflict between the purpose of Section 1983 of Title 42 of the United States Code and the purpose of the Missouri Incarceration Reimbursement Act. Based upon the following analysis, the Court concludes that in the particular circumstances of this case plaintiff's motion for proceedings in aid of execution should be granted and defendant's motion should be denied.

I. BACKGROUND

On August 8, 1989, a jury returned a verdict in favor of plaintiff in this action for his claims under 42 U.S.C.A. § 1983 (1981). Plaintiff Hankins alleged that Defendant Finnel sexually harassed him from 1984 to 1988 while plaintiff was an inmate in the Missouri State Penitentiary and defendant was a teacher in that institution. The jury awarded plaintiff one dollar ($1.00) in nominal damages and three thousand dollars ($3,000.00) in punitive damages. Defendant Finnel, represented by the Attorney General's office and indemnified by the State of Missouri, appealed the verdict. The Eighth Circuit, on June 29, 1990, affirmed the judgment and verdict.

On July 31, 1990, the State of Missouri instituted *ex parte* proceedings in state court against Mr. Hankins, seeking reimbursement for the cost of his incarceration as provided under the Missouri Incarceration Reimbursement Act, Mo. Ann. Stat. §§ 217.825 - 217.841 (West Supp. 1991). The State sought reimbursement equal to ninety percent (90%) of the amount plaintiff received as judgment from the State which indemnified Defendant Finnel. The Missouri Act authorizes forfeiture of 90% of an inmate's assets for reimbursement. Mo. Ann. Stat. § 217.833. On Friday, August 17, 1990, the state court granted the State of Missouri's request to appoint a receiver selected by the State of Missouri to hold Mr. Hankins' funds. The Court further ordered Mr. Hankins to show cause why it should not enter an order appropriating and applying his assets toward reimbursement of the cost of his confinement. The state court judge subsequently stayed the state court proceedings pending the outcome of this federal proceeding.

Mr. Hankins' inmate account statement reveals that on Monday, August 20, 1990, the State first debited his account #3,234.22 for "Cell Reimbursement," and later on the same day deposited $3,234.22 into his overdrawn account.

Upon learning of the state court proceedings, Plaintiff Hankins filed the motions presently before this Court.

II. ANALYSIS

This case requires a two-step analysis. First, the Court must examine its authority to enforce its judgment. Based on the following reasoning, the Court determines that it retains jurisdiction over this proceeding to enforce its judgment, pursuant to Rule 69. The Court's enforcement of this Section 1983 judgment exposes a conflict with the State's authority to obtain reimbursement for incarceration costs under the Missouri law. Because of this conflict, the Court must also assess the issue of federal preemption under the Supremacy Clause.

A. Enforcement of Judgment

In order to effectuate its judicial power, a federal court has authority to enforce its judgment and to conduct proceedings to aid executive of its judgment through a writ of executive. Fed. R. Civ. P. 69(a). Where no federal law governs the enforcement of a given judgment, the law of the forum state applies. *Id.*; *United States ex rel. Goldman v. Meredith,* 596 F.2d 1353 (8th Cir. 1979), *cert. denied,* 444 U.S. 838, 100 S.Ct. 76 (1979).

1. Missouri Law to Enforce Judgment

Section 1983 provides no mechanism for enforcement of a judgment, so the Court must incorporate Missouri state law. *See United States v. Hackett,* 123, F. Supp. 106, 107 (W.D. Mo. 1954) (applying state law to enforce judgment). According to Missouri law, "a writ of prohibition shall be granted to prevent usurpation of judicial power." Mo. Ann. Stat. § 530.010 (1953). Courts are empowered to conduct proceedings in prohibition and "to direct the form of such further details of procedure as may be necessary to the orderly course of the case, or to give effect to said remedy, in accordance with the general principles of law upon the subject." *Id.* at § 530.090.

Mr. Finnel, who is represented by the State, argues that this Court lacks jurisdiction over the State of Missouri because it is a nonparty to this action. Defendant maintains that the Court lacks jurisdiction over what he describes as a federal claim raised as a defense to a separate state court action for reimbursement.

This Court rejects defendant's arguments. This is a proceeding to enforce the judgment in the above-titled action. The Court obtains jurisdiction over the State of Missouri based upon the State's consent to satisfy the judgment against Mr. Finnel.

The Seventh Circuit has held that, under Rule 69(a) and the applicable state law, a district court may retain jurisdiction to conduct ancillary proceedings against nonparties which have an obligation to indemnify the individual held liable in a Section 1983 action. *Argento. v. Village of Melrose Park*, 838 F.2d 1483, 1487-88 (7th Cir. 1988). Like Mr. Finnel, the defendant in *Argento* argues that the federal court lacked jurisdiction over a separate proceeding involving a nonparty to the original civil rights action. *Id.* at 1487. The *Argento* court refused to draw a party/nonparty distinction. Instead, the Court found it had jurisdiction over an ancillary indemnification claim in order to enforce the Section 1983 judgment. *Id.* at 1488-89 (citing similar decisions from other circuits in support). *See also Mississippi Valley Barge Line Co. v. United States*, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd sub nom., Osbourne v. Mississippi Valley Barge Line Co.*, 389 U.S. 579, 88 S. Ct. 692 (1968) (federal court has authority to issue orders effectuating its original judgment against a nonparty under 28 U.S.C. § 1651).

2. Ancillary Jurisdiction Under Rule 69(a) and the Issue of State Sovereignty

This Court concludes that it has ancillary jurisdiction to enforce the civil rights judgment against Mr. Finnel, pursuant to Rule 69(a) and Missouri law. The Court acknowledges that the supplementary proceedings necessarily involve a nonparty to the original action, the State of Missouri.

Defendant argues that Eleventh Amendment immunity bars enforcement of the judgment as it pertains to the State. However, as this Court sees it, the State has waived its immunity as it pertains to the judgment in this case. The State of Missouri has voluntarily agreed to indemnify its state employee Mr. Finnel and, in fact, claims it has paid the judgment in this case. *See* Mo. Ann. Stat. § 105.711 (West Supp. 1991) (State Legal Expense Fund). This court has jurisdiction over the State only insofar as necessary to enforce its judgment, the judgment the State voluntarily agreed to indemnify.

A state's immunity under the Eleventh Amendment is strictly construed. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241, 105 S. Ct. 3142, 3146 (1985). Waiver of a state's sovereign immunity can arise in only circumstances: (1) where Congress expressly abrogates state immunity; (2) where the state expressly or "by such overwhelming implication from the text" waives its immunity or consents to suit in federal court. *Id.* (quoting *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S. Ct. 1347, 1361 (1974)). A general waiver is not enough to abrogate a state's Eleventh Amendment immunity. *Id.,* 473 U.S. at 246, 105 S. Ct. at 3149. *See also Welch v. Texas Dept of Highways & Pub. Transp.,* 483 U.S. 468, 475-88, 107 S. Ct. 2941, 2946-54 (1987) (reviewing rationale behind Eleventh Amendment immunity).

This case focuses on the State of Missouri's affirmative conduct to satisfy the federal court judgment entered against Defendant Finnel. This is not a general waiver. The State has voluntarily and specifically agreed to indemnify a state employee for a federal court judgment. The State misrepresents that it has satisfied this judgment due to the State's bookkeeping maneuvers. The State cannot new refuse to fulfill that obligation by hiding behind the Eleventh Amendment and the fiction of *Ex parte Young,* a party can enforce constitutional state conduct by

suing a state official, but not the state. Wright, Miller & Coooper, [sic] *Federal Practice and Procedure* §4231 (2d ed. 1988).

This Court finds that the State of Missouri has waived its immunity under the Eleventh Amendment to the extent it has voluntarily accepted the obligation of the civil rights judgment against Defendant Finnel. This Court has jurisdiction over Defendant Finnel and over the State of Missouri to the extent it has chosen to act in his stead. The source of this Court's federal jurisdiction is its authority to enforce its judgment under Rule 69(a) and its authority to protect plaintiff's federal rights in federal court.

Under the *Ex parte Young* doctrine, federal courts can "vindicate federal rights and hold state officials responsible." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 105, 104 S. Ct. 900, 910 (1984). In this case, the Court vindicated Mr. Hankins' federal civil rights under Section 1983 and awarded a punitive judgment against Mr. Finnel. Mr. Finnel is subject to this Court's enforcement and cannot evade satisfying the judgment by having the State indemnify him. Where the State has stepped in to satisfy the judgment against Mr. Finnel, the State cannot then assert its Eleventh Amendment immunity to circumvent the Court's authority to enforce that judgment.

B. Conflict of State and Federal Law: The Supremacy Clause

Once the Court has established its authority pursuant to Rule 69(a), the effect of enforcing the Section 1983 judgment brings to light a conflict with the Missouri Incarceration Reimbursement Act. Under the Act, the State of Missouri intends to seize for reimbursement the very judgment it paid to Mr. Hankins. The State's conduct thwarts the objective of Section 1983 and its protection of federal rights through suits against state officials. The purpose of the Act and of Section 1983 reveal the federal law must preempt.

1. Missouri Incarceration Reimbursement Act

The state law is clear on its face. Under the Missouri Incarceration Reimbursement Act, the State of Missouri may bring an action in circuit court to obtain reimbursement from prisoners for incarceration expenses. Mo. Ann. Stat. § 817.835. The Act specifies that no more than ninety percent of a prisoner's assets may be seized. *Id.* at 817.833. "Assets," as defined in the Act, include

> A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state[.]

Id. at § 217.827(1-a)(b).

In Mr. Hankins' case, the State of Missouri represented and indemnified its former employee, the defendant in this action, William Finnel. Pursuant to the Act, the State has initiated state court proceedings to attach the money judgment Mr. Hankins received as a punitive award in his Section 1983 action against a state employee. Mr. Hankins argues that the Act conflicts with the judgment in this action and his rights under federal law, 42 U.S.C.A. § 1983. Therefore, Mr. Hankins contends that the Missouri Act should be invalidated.

2. Section 1983

The intention of Section 1983 is not only to compensate victims of past abuses, but also to deter future violations of constitutional and federal rights. *Owen v. City of Independence,* 445 U.S. 622, 651, 100 S. Ct. 1398, 1416 (1980) (finding municipalities liable under § 1983); *Carey v. Piphus,* 435 U.S. 247, 254-59, 98 S. Ct. 1042, 1047-50 (1978) (authorizing § 1983 damages against school officials for pain and suffering). In the

following analysis, the Court considers whether Missouri's Incarceration Act conflicts with the underlying intent of Section 1983.

3. Supremacy Clause

The Supremacy Clause invalidates state laws that interfere with or contravene the purpose of a federal statute. *See Rose v. Arkansas State Policy*, 479 U.S. 1, 107 S. Ct. 334 (1986). Under the Supremacy Clause, federal laws preempt state laws "in a wide array of contexts, from circumstances in which federal and state laws are plainly contradictory to those in which the incompatibility between state and federal laws is discernible only through inference." *Hayfield N.R.R. v. Chicago & N.W. Transp.*, 467 U.S. 622, 627, 104 S. Ct. 2610, 2614 (1984).

In *Bennett v. Arkansas*, 485 U.S. 395, 108 S. Ct. 1204 (1988) (per curiam,), the Supreme Court found that the Supremacy Clause invalidated that portion of an Arkansas statute which permitted the state to attach a prisoner's social security benefits for reimbursement of incarceration costs. The Arkansas law authorized the state to seize a prisoner's "estate" for reimbursement of incarceration costs and defined "estate" to include social security benefits. *Id.*, 485 U.S. at __, 108 S. Ct. at 1205. The Supreme Court invalidated the state law because it conflicted with an express provision of the Social Security Act and the clear intent of Congress to exempt social security benefits from such attachments. *Id.*, 485 U.S. at __, 108 S. Ct. at 1205-06.

As in *Bennett v. Arkansas*, the question of supremacy in this case concerns a state incarceration reimbursement statute. Unlike *Bennett*, there is no provision in federal law which expressly conflicts with the state's right to attach a prisoner's assets, in this case assets from the Court's judgment in a Section 1983 action. Therefore, the Court must look beyond the express terms of Section 1983 and apply Congress's intent in Section 1983.

The Missouri Act, as applied in this case, directly conflicts with the purpose of punitive damages under Section 1983. The circumstances in this case cannot be construed otherwise. Essentially, the State has conducted a "shell game": with sleight of hand, the State has maneuvered the money judgment owed Mr. Hankins from one shell to another. As applied in this instance, the Missouri Incarceration Act would protect the State of Missouri and its employees from ever suffering the intended effect of a punitive award under Section 1983 and would leave Mr. Hankins with no prospect of receiving his judgment.

Section 1983 preempts Missouri's Incarceration Reimbursement Act as applied in this case, because the Act conflicts with Congress's intent to compensate victims of past abuse and to deter future violations of constitutional and federal rights. Application of the Act to authorize forfeiture of money paid by the State for damages in a civil rights action against a state employee is invalidated. Especially in a case such as this where the damages are punitive, preemption of the Act is required to deter other state employees from violating prisoners' federal rights.

If the State of Missouri were able to recoup 90% of every civil rights judgment award against its state employees, neither the State nor its employees would have the incentive to comply with federal constitutional rights of prisoners. The Supremacy Clause demands that the portion of the Missouri Incarceration Reimbursement Act which conflicts with the intent of Section 1983 must be invalidated.

III. CONCLUSION

This Court has authority, pursuant to Rule 69 and Missouri law, to conduct further proceedings to enforce its judgment. In this case, the Court will enforce the Section 1983 judgment against Defendant Finnel. However, in order to enforce that judgment, the Court must address the conduct of the State of Missouri which has voluntarily chosen to fulfill Defendant

Finnel's obligation. Through a bookkeeping maneuver, the State has effectively evaded satisfying the judgment. The State debited Plaintiff Hankins' prison account for prison expenses, pursuant to the Missouri Incarceration Reimbursement Act, and then the State "paid" the Section 1983 judgment into the negative balance account.

To permit the State to recoup for prison expenses 90% of a Section 1983 award against any state employee would undermine the purpose of Section 1983. If the State were permitted to seize the Section 1983 damage awards prisoners receive for prison employees' conduct, the prisoners would have no motive to bring such suits and the State and its employees would have no inducement to comply with federal law. Prisoners are in a precarious position, as Plaintiff Hankins' suit demonstrates. Section 1983 provides a necessary mechanism whereby prisoners can demand their federal rights against the unconstitutional actions of state officials. As applied in this case, the Missouri Incarceration Reimbursement Act directly conflicts with Section 1983. Therefore, Section 1983 preempts the Missouri Act to the extent that it authorizes forfeiture of a Section 1983 damage award received by a prisoner against a state prison employee.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted for proceedings in aid of execution of the judgment of this Court entered August 8, 1989. It is further

ORDERED that the State of Missouri is permanently enjoined from attaching the funds received by Ronald Hankins as damages in this action. It is further

ORDERED that as applied in this case, the Missouri Incarceration Reimbursement Act, Mo. Ann. Stat. §§ 217.825 to 217.841, violates the Supremacy Clause and is therefore invali-

dated to the extent that it conflicts with Congress's intent to award damages under 42 U.S.C.A. § 1983. It is further

ORDERED that plaintiff's motion for writ of mandamus is denied as moot. It is further

ORDERED that defendant's motion to strike plaintiff's motions is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

January 28, 1991.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMENDED ORDER

No. 91-1299WMJC

Ronald Hankins,
Appellee,

vs.

William S. Finnel; State of Missouri,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion for rehearing en banc. The petition for rehearing is also denied.

June 25, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE LEGAL EXPENSE FUND

105.711. Legal expense fund created—officers, employees, agencies, certain physicians covered, procedure—certain claims, limitations—funds not transferable to general revenue.—1. There is hereby created a "State Legal Expense Fund" which shall consist of moneys appropriated to the fund by the general assembly and moneys otherwise credited to such fund pursuant to section 105.716.

2. Moneys in the state legal expense fund shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against:

(1) The state of Missouri, or any agency of the state, pursuant to section 537.600, RSMo;

(2) Any officer or employee of the state of Missouri or any agency of the state, including, without limitation, elected officials, appointees, members of state boards or commissions and members of the Missouri national guard upon conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state, or any agency

of the state, provided that moneys in this fund shall not be available for payment of claims made under chapter 287, RSMo; or

(3)(a) Any physician, psychiatrist, pharmacist, podiatrist, dentist, nurse or other health care provider licensed to practice in Missouri under the provisions of chapter 330, 332, 334, 335, 336, 337, or 338, RSMo, who is employed by the state of Missouri or any agency of the state, under formal contract to provide services to patients or inmates of state correctional facilities on a part-time basis; or

(b) Any physician licensed to practice medicine in Missouri under the provisions of chapter 334, RSMo, who is employed by or under contract with a city or county health department organized under chapter 192, RSMo, or chapter 205, RSMo, or a city health department operating under a city charter, or a combined city-county health department to provide services to patients for medical care caused by pregnancy, delivery and child care, if such medical services are provided by the physician pursuant to the contract without compensation or the physician is paid from no other source than a governmental agency except for patient copayments required by federal or state law or local ordinance. The department of health shall promulgate rules regarding contract procedures and the documentation of care provided under paragraph (a) or (b) of this subdivision. The limitation on payments from the state legal expense fund or any policy of insurance procured pursuant to the provisions of section 105.721, provided in subjection 4 of this section, shall not apply to any claim or judgment arising under paragraph (a) or (b) of this subdivision. Any claim or judgment arising under paragraph (a) or (b) of this subdivision shall be paid by the state legal expense fund and any policy of insurance procured pursuant to section 105.721, to the extent damages are allowed under sections 538.205 to 538.235, RSMo. Liability or malpractice insurance obtained and maintained in force by any physician for coverage concerning his or her private practice and his personal

assets shall not be considered available to pay claims arising from such physician's services rendered as defined in paragraph (a) or (b) of this subdivision. Even if paragraph (a) or (b) of this subdivision is repealed or modified, the state legal expense fund shall be available for damages which occur while paragraph (a) or (b) of this subdivision is in effect; or

(c) Any physician licensed to practice medicine in Missouri under the provisions of chapter 334, RSMo, who is employed by or under contract with a federally funded community health center organized under section 315, 329, 330 or 340 of the Public Health Services Act (42 U.S.C. 216, 254c) to provide services to patients for medical care caused by pregnancy, delivery and child care, if such medical services are provided by the physician pursuant to the contract or employment agreement without compensation or are paid from no other source than a governmental agency or such a federally funded community health center except for patient copayments required by federal state law or local ordinance. The department of health shall promulgate rules regarding contract procedures and the documentation of care provided under this paragraph. Any claim or judgment arising under this paragraph shall be paid by the state legal expense fund, to the extent damages are allowed under sections 538.205 to 538.235, RSMo. Liability or malpractice insurance obtained and maintained in force by any physician for coverage concerning his or her private practice and his personal assets shall not be considered available to pay judgments for which the state legal expense fund in liable under this paragraph. A physician may purchase liability or malpractice insurance for coverage of liability claims or judgments based upon care rendered under this paragraph which exceed the amount of liability coverage provided by the state legal expense fund under this paragraph. Even if this paragraph is repealed or modified, the state legal expense fund shall be available for damages which occur while this paragraph is in effect. In the case of any claim or judgment that arises under this paragraph, the aggregate of

payments from the state legal expense fund shall be limited to a maximum of one million dollars for all claims arising out of and judgments based upon the same act or joined in a single cause, and shall not exceed one millions dollars for any one claimant.

3. All payments shall be made from the state legal expense fund by the commissioner of administration with the approval of the attorney general.

4. In the case of any claim or judgment that arises under sections 537.600 to 537.610, RSMo, against the state of Missouri, or an agency of the state, the aggregate of payments from the state legal expense fund and from any policy of insurance procured pursuant to the provisions of section 105.721 shall be limited to a maximum of eight hundred thousand dollars for all claims arising out of and judgments based upon the same act or joined in a single cause, and shall not exceed one hundred thousand dollars for any one claimant. No payment shall be made from the state legal expense fund or any policy of insurance procured with state funds pursuant to section 105.721 unless and until the benefits provided to pay the claim by any other policy of liability insurance have been exhausted.

5. The provisions of section 33.080, RSMo, notwithstanding, any moneys remaining to the credit of the state legal expense fund at the end of an appropriation period shall not be transferred to general revenue.

105.716. Attorney general to handle claims, exceptions—certain departments to reimburse fund—prior to settlement, payment of certain legal expenses authorized, when.— 1. Any investigation, defense, negotiation, or compromise of any claim covered by sections 105.711 to 105.726 shall be conducted by the attorney general; provided, that in the case of any claim against the department of conservation, the department of highways and transportation or a public institution which awards baccalaureate degrees, or any officer or employee

of such department or such institution, any investigation, defense, negotiation, or compromise of any claim covered by sections 105.711 to 105.726 shall be conducted by legal counsel provided by the respective entity against which the claim is made or which employs the person against whom the claim is made. In the case of any payment from the state legal expense fund based upon a claim or judgment against the department of conservation, the department of highways and transportation or any officer or employee thereof, the department so affected shall immediately transfer to the state legal expense fund from the department funds a sum equal to the amount expended from the state legal expense fund on its behalf.

2. All persons and entities protected by the state legal expense fund shall cooperate with the attorneys conducting any investigation and preparing any defense under the provisions of sections 105.711 to 105.726 by assisting such attorneys in all respects, including the making of settlements, the securing and giving of evidence, and the attending and obtaining witness to attend hearings and trials. Funds in the state legal expense fund shall not be used to pay claims and judgments against those persons and entities who do not cooperate as required by this subsection.

3. The provisions of sections 105.711 to 105.726 notwithstanding, the attorney general may investigate, defend, negotiate, or compromise any claim covered by sections 105.711 to 105.726 against any public institution which awards baccalaureate degrees whose governing body has declared a state of financial exigency.

4. Notwithstanding the provisions of subsection 2 of section 105.711, funds in the state legal expense fund may be expended prior to the payment of any claim or any final judgment to pay costs of defense, including reasonable attorney's fees for retention of legal counsel, when the attorney general determines that a conflict exists or particular expertise is required, and also to pay

for related legal expenses including medical examination fees, expert witness fees, court reporter expenses, travel costs and ancillary legal expenses incurred prior to the payment of a claim or any final judgment.

COST OF CARE, REIMBURSEMENT BY PRISONERS

217.825. Citation of law.—Sections 217.825 to 217.841 shall be known and may be cited as the **"Missouri Incarceration Reimbursement Act"**.

217.827. Definitions.—As used in section 217.825 to 217.841, the following terms shall mean:

(1)(a) **"Assets"**, property, tangible or intangible, real or personal belonging to or due an offender or a former offender, including income or payments to such offender from social security, workers' compensation, veterans' compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, including any of the following:

a. Money or other tangible assets received by the offender as a result of a settlement of a claim against the state, any agency thereof, or any claim against any employee or independent contractor arising from and in the scope of said employees' or contractor's official duties on behalf of the state or any agency thereof;

b. A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state;

(b) **"Assets"** shall not include:

a. The homestead of the offender up to fifty thousand dollars in value;

b. Money saved by the offender from wages and bonuses up to two thousand five hundred dollars paid the offender while he or she was confined to a state correctional facility;

(2) **"Cost of care"**, the cost to the department of corrections for providing transportation, room, board, clothing, security, medical, and other normal living expenses of offenders under the jurisdiction of the department, as determined by the director of the department;

(3) **"Department"**, the department of corrections of this state;

(4) **"Director"**, the director of the department;

(5) **"Offender"**, any person who is under the jurisdiction of the department and is confined in any state correctional facility or is under the continuing jurisdiction of the department;

(6) **"State correctional facility"**, a facility or institution which houses an offender population under the jurisdiction of the department. State correctional facility includes a correctional camp, community correction center, honor center, or state prison.

217.819. Assets to be listed by prisoners on form under oath—failure to comply, effect.—1. The department shall develop a form which shall be used by the department to obtain information from all prisoners regarding assets of the prisoners.

2. The form shall be submitted to each person who is a prisoner as of the date the form is developed and to every person who thereafter is sentenced to imprisonment under the jurisdiction of the department. The form may be resubmitted to a prisoner by the department for purposes of obtaining current information regarding assets of the prisoner.

3. Every prisoner shall complete the form or provide for completion of the form and the prisoner shall swear or affirm under oath that to the best of his or her knowledge the information provided is complete and accurate.

4. Failure by a prisoner to fully and adequately complete the form may be considered for purposes of a parole determination.

217.831. Director to report to attorney general on prisoner's assets and cost of care—attorney general's power to investigate and seek reimbursement, when.—1. The director shall forward to the attorney general a report on each prisoner containing a completed form pursuant to the provisions of section 217.819 together with all other information available on the assets of the prisoner and an estimate of the total cost of care for that prisoner.

2. The attorney general may investigate or cause to be investigated all reports furnished pursuant to the provisions of subsection 1 of this section. This investigation may include seeking information from any source that may have relevant information concerning a prisoner's assets.

3. If the attorney general upon completing the investigation under subsection 2 of this section has good cause to believe that a prisoner has sufficient assets to recover not less than ten percent of estimated cost of care of the prisoner or ten percent of the estimated cost of care of the prisoner for two years, whichever is less, the attorney general may seek to secure reimbursement for the expense of the state of Missouri for the cost of care of such prisoner.

217.833. Percent of prisoner's assets that may be used for reimbursement—limitation.—1. Not more than ninety percent of the value of the assets of the prisoner may be used for purposes of securing costs and reimbursement pursuant to the provisions of sections 217.825 to 217.841.

2. The amount of reimbursement sought from a prisoner shall not be in excess of the per capita costs for care for maintaining prisoners in the state correctional facility in which the prisoner is housed for the period or periods such prisoner is a prisoner in a state correctional facility.

217.835. Jurisdiction, certain circuit courts—service—hearing—support obligations of prisoner to be considered—court order to reimburse, when.—1. The circuit court shall have exclusive jurisdiction over all proceedings seeking reimbursement from prisoners pursuant to the provisions of sections 217.825 to 217.841. The attorney general may file a complaint in the circuit court for the county or city from which a prisoner was sentenced or in the circuit court in the county or city of the office of the director of the department, against any person under the jurisdiction of the department stating that the person is or has been a prisoner in a state correctional facility, that there is good cause to believe that the person has assets, and praying that the assets be used to reimburse the state for the expenses incurred or to be incurred, or both, by the state for the cost of care of the person as a prisoner.

2. Upon the filing of the complaint under subsection 1 of this section, the court shall issue an order to show cause why the prayer of the complainant should not be granted. The complaint and order shall be served upon the person personally, or, if the person is confined in a state correctional facility, by registered mail addressed to the person in care of the chief administrator of the state correctional facility where the person is housed, at least thirty days before the date of hearing on the complaint and order.

3. At the time of the hearing on the complaint and order, if it appears that the person has any assets which ought to be subjected to the claim of the state pursuant to the provisions of sections 217.825 to 217.841, the court shall issue an order requiring any person, corporation, or other legal entity possessed

or having custody of such assets, to appropriate and apply such assets or a portion thereof to satisfy such claim.

4. At the hearing on the complaint and order and before entering any order on behalf of the state against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

5. If the person, corporation, or other legal entity shall neglect or refuse to comply with an order issued pursuant to subsection 3 of this section, the court shall order the person, corporation, or other legal entity to appear before the court at such time as the court may direct and to show cause why the person, corporation, or other legal entity should not be considered in contempt of court.

6. If, in the opinion of the court, the assets of the prisoner are sufficient to pay the cost of the proceedings undertaken pursuant to the provisions of sections 217.825 to 217.841, the prisoner shall be liable for those costs upon order of the court.

217.837. Legal remedies authorized to protect assets of prisoner—execution against homestead of prisoner prohibited—state's claim to have priority.—1. Except as provided in subsection 3 of this section, the attorney general may use any remedy, interim order, or enforcement procedure allowed by law or court rule including an ex parte restraining order to restrain the prisoner or any other person or legal entity in possession or having custody of the estate of the prisoner from disposing of certain property in avoidance of an order issued pursuant to the provisions of section 217.835.

2. To protect and maintain assets pending resolution of proceedings initialed pursuant to the provisions of section 217.835, the court, upon request, may appoint a receiver.

3. The attorney general or a prosecuting attorney shall not enforce any judgment obtained pursuant to the provisions of section 217.835 by means of execution against the homestead of the prisoner.

4. The state's right to recover the cost of incarceration pursuant to an order issued pursuant to the provisions of section 217.835 shall have priority over all other liens, debts, or other incumbrances [sic] against real property or any other assets which are part of a prisoner's estate.

217.839. Attorney general's powers and duties—assistance by certain officials required.—1. The attorney general of this state shall enforce the provisions of sections 217.825 to 217.841, except that the attorney general may request the prosecuting attorney of the county or city in which the prisoner was sentenced or the prosecuting attorney of the county or city in which any asset of a prisoner is located to make an investigation or assist in legal proceedings undertaken pursuant to the provisions of sections 217.825 to 217.841.

2. The sentencing judge, the sheriff, the county or city, the chief administrator of the state correctional facility, and the state treasurer shall furnish to the attorney general or prosecuting attorney all information and assistance possible to enable the attorney general or prosecuting attorney to secure reimbursement for the state pursuant to the provisions of sections 217.825 to 217.841.

3. The secretary of state, the director of the department of revenue, and the director of the department of social services shall provide the attorney general or prosecuting attorney with all information requested pursuant to the provisions of sections 217.825 to 217.841.

4. Any county or municipal official having custody of records of the estate or real property of any inmate shall surrender said

records or certified copies thereof without fee to the attorney general or prosecuting attorney who request such records pursuant to the provisions of sections 217.825 to 217.841.

217.841. Costs of investigation, how paid—deposit of reimbursement—state treasurer, duties.—1. The costs of any investigations shall be paid from the reimbursements secured pursuant to the provisions of sections 217.825 to 217.841, and the balance of the reimbursements shall be credited to the general fund of the state to be available for general fund purposes.

2. The state treasurer may determine the amount due the state for the cost of care of a prisoner and render statements thereof and such sworn statements shall be considered prima facie evidence of the amount due.